No. 81-2101

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Petitioners

v.

TERRI LEE HALDERMAN, et al.,

Respondents

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SUPREME COURT, U.S.

HALDERMAN RESPONDENTS' PETITION
TO DISMISS CERTIORARI
AS IMPROVIDENTLY GRANTED

Substantially altering all its prior Orders, and granting new and extraordinary deference to State and County defendants' discretion, the District Court has entered a new Order which changes the nature of this case and renders it inappropriate for this Court to continue its review on certiorari.

The District Court's August 26, 1983 Order, attached hereto as Exhibit A, permits the state to "propose a plan for achieving compliance" and leaves "specific guidelines on the proper level of institutionalization . . . to the States to determine in the first instance." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 54, 55 (opinion of J. White) and 30 n. 23 (opinion of the Court). The Commonwealth defendants must file certain plans for compliance within 90 days. Aug. 26 Order at

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Par. 5, 6. If the defendants object to any formulations in the August 26 Order, they may have a hearing on those objections and seek further leeway and discretion. Id. at page 41.

In addition, every important implementation function is turned over to the defendants -- in full. Among these are: monitoring of community homes (par. 27), management of implementation (par. 18), adoption of the defendants' new placement procedures (par. 30(a), 35, App. F), training of case managers (par. 31), assignment of advocates (par. 32), approval of relocation of class members (par. 33).

Though it includes absolutely no new requirements, to be sure, the August 26 Order is lengthy; it incorporates much of the structure and text of the prior orders below, revamping and restricting and revising them, and it also incorporates prior agreements by the defendants. Par. 27.

The following chart illustrates some of the most significant changes wrought by the August 26 Order:

Prior Orders/Procedures (reference is to 3/17/78 Order and ¶ no., unless otherwise stated)	August 26, 1983 Order (reference is to ¶ numbers)
Class definition included those in jeopardy of Pennhurst commitment due to unavailability of alternatives. 446 F.Supp. at 1300.	Class affected is reduced. Now includes only former Pennhurst residents and some on waiting list. ¶ 1.
Special Master planned for compliance. ¶ 6-11.	State plans compliance. ¶ 5-6.

No provision for objection to order and hearing thereon	Defendants will be heard on objections. Page 41.
Monitoring of community services done by Special Master. (pursuant to each placement order).	Defendants will monitor, pursuant to their own agreements. ¶ 27.
No provision recognizing state management of implementation.	State's own Special Management Unit recognized. ¶ 18.
Placement Procedures were Guidelines written by Special Master and State, overseen by Master.	State's own Placement Procedures adopted after motion by State (with minor changes), and to be overseen by State. ¶ 30(a), 35, App. F.
Case managers trained by Master. ¶ 8.2, 3/5/79 Order.	State trains case managers. ¶ 31.
Advocate assigned by Master. ¶ 9.0, 3/5/79 Order.	State assigns advocate. ¶ 32.
Master approved all relocations of class members. ¶ 11.0, 3/5/79 Order.	State approves relocations. ¶ 33.
No movement from Pennhurst without Master approval (after recommendation by defendants). Guidelines for Case Managers.	State's own management unit approves movement from Pennhurst. ¶ 37.
Nature of pre-placement visits to community home overseen by Master. Id.	Nature of pre-placement visits in "discretion" of County. ¶ 37.

The remaining two issues before this Court -- sovereign immunity and comity/pendent jurisdiction -- arise on the March 17, 1978 Order entered immediately post-trial. There has been a long history in this case since then and the provisions of the 1978 Order most relevant to this certiorari petition no longer exist. The facts have changed. The disputed Order has changed. And the gravamen of the Petitioners' complaint -- that a federal court is intruding on state processes -- is reduced to the point of extreme tenuousness.

Any decision on the 1978 Order is bound to be advisory and speculative, since the terms of that Order no longer control. Rather, the Petitioners have obtained already from the lower court all they could reasonably obtain from this Court: discretion to act, so long as the constitutional and other rights of incarcerated people are not violated.

This Court cannot evaluate the new August 26 Order without review of the hearings which led up to it; the Court of Appeals may have an opportunity to review that Order first. Then, upon further petition on a full record, the Court may, if it is still appropriate, review this case again.

The prospect of another review in this Court should be no deterrent to dismissal of certiorari now, since another review is in any event possible if Petitioners succeed in convincing this Court that the case should be remanded for decision on the constitutional issues undecided below.

Accordingly, Respondents respectfully move this Honorable Court to dismiss certiorari as improvidently granted.

Respectfully submitted,

David Ferleger
37 S. 20th Street, Suite 601
Philadelphia, Pa. 19103
215-567-2828

August 31, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.,	:	
Defendants	:	
UNITED STATES OF AMERICA,	:	FILED AUG 29 1983
Plaintiff-Intervenor	:	
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,	:	
Plaintiffs-Intervenors	:	NO. 74-1345

ORDER

AND NOW, this 26th day of August, 1983, the Office of the Special Master having ceased operation on December 31, 1982 pursuant to this Court's Order of August 12, 1982, and this Court, as a result of this change, having requested proposed amendments to its Orders of March 17, 1978 and April 24, 1980, the Court having held hearings thereon, and having received written and oral comments from the parties, hereby ORDERS that this Court's Orders of March 17, 1978 and April 24, 1980 are AMENDED as follows:

1. Commonwealth and county defendants, their successor, and their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them are permanently

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CLERK OF COURT

[Ex. A]

enjoined to provide suitable community living facilities for the retarded residents of Pennhurst, and those retarded persons on its waiting list (hereinafter "class member"), together with such community services as are necessary to provide them with minimally adequate habilitation until such time as the retarded individual is no longer in need of such living facility and/or community services. The term "class member" as used in this Order refers to any retarded person who resided at Pennhurst at any time on or after May 30, 1974, and to any retarded person on the waiting list for admission to Pennhurst as of March 17, 1978, who is in need of habilitation and who is being considered for placement in a community living facility or in any facility operated by the Commonwealth or County defendants.

2. Commonwealth and County defendants, as aforesaid, are permanently enjoined to develop and to provide a written individualized program plan, formulated in accordance with professional standards (Opinion, page 25, 446 F. Supp. at 1305-06; Roos N.T. 1-115, 1-116, Hare N.T. 8-168) to each class member, to provide to each an individualized habilitation program in accordance with said plan, to provide annual periodic review thereof and the opportunity for each class member and his or her parent/guardian or certified advocate to be heard thereon. The term "parent/guardian" as used in this Order includes, in the absence of a parent/guardian, the closest other living relative of the class member, provided that such relative has demonstrated an active interest in the welfare and habilitation of the class member through visits or

other forms of contact with the class member.

3. Commonwealth and County defendants, as aforesaid, are permanently enjoined to provide all necessary and proper monitoring and inspection mechanisms to assure that community living facilities and other community services of the necessary quantity and quality are provided and maintained.

4. Commonwealth and County defendants, as aforesaid, are permanently enjoined to implement with dispatch Act 256 of the 1970 Pennsylvania General Assembly, the specific schedule to be set by further Order of this Court.

5. Commonwealth defendants shall prepare and present to this Court for its approval and order a Plan of Implementation which shall include the following:

(a) A plan, consistent with the prior Orders of this Court including but not limited to the Orders of March 2, 1981, and January 14, 1983, specifying the quantity and type of community living facilities (CLFs) and other community services (including but not limited to medical care, medication administration and review, behavior management, and sheltered workshops and other day programs for adults) necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting, taking into account the existing community services in the five county area and including, by county, specification of the residential, program and staffing patterns necessary, the delineation of responsibility for their creation and maintenance, their funding and a specified time frame for their provision. Sources and anticipated or available amounts of funding for all needed services shall be identified with specificity in the plan.

(b) A report specifying resources, procedures, and a schedule for individual evaluations and the formulation of individual exit and community program plans required for the habilitation of each class member and for their periodic review.

(c) A plan for the recruitment, hiring and training of a sufficient number of qualified community staff (including case managers) to manage the preparation of individual exit and community program plans for each member of plaintiff class and upon completion of such plans to assist in the execution of the responsibility to create, develop, maintain, monitor and inspect the community living arrangements and other services required; and for the recruitment, hiring, training, and long-term maintenance of qualified staff to work in community programs.

(d) A plan for the creation, development and maintenance of mechanisms to monitor and inspect a system of community services to assure that community living facilities and other community services of the necessary quality and quantity are continuously provided to retarded persons in the least separate, most integrated, least restrictive community setting in which the class member can receive minimally adequate habilitation.

(e) A plan to provide the class members with consultation and continuing information concerning the effect and implementation of the Orders of this Court, the plans to provide all necessary community living facilities and other

community services to them, and any other general or specific information regarding the conditions necessary to habilitation of retarded persons.

(f) A plan to provide parents/guardians and certified advocates of the class members with consultation and continuing information concerning the effect and implementation of the Orders of this Court, the plans to provide all necessary community living facilities and other community services to their retarded relatives, and any other general or specific information regarding the conditions necessary to habilitation of retarded persons.

6. The Commonwealth defendants shall, if they have not already done so, file with this Court the plans required by paragraphs 5(a) through (f) above 90 days from the date of this Order.

7. Commonwealth defendants are hereby mandated to take every precaution to prevent the physical or psychological abuse, neglect or mistreatment of any Pennhurst resident. Each and every alleged incident of abuse, neglect or mistreatment shall be promptly investigated pursuant to the procedures set forth in this Order.

(a) Resident Abuse. Abuse is any action which may cause or causes, physical or psychological harm or injury and includes any wilful action which violates regulations on use of restraints. Any abuse, neglect

or mistreatment of any resident, whether it be physical or psychological, shall not be tolerated.

(b) Physical Abuse. Physical abuse includes, but is not limited to: (a) hitting, (b) kicking, (c) corporal punishment, or any other activity which results in physical pain as specified in the current Pennhurst Physical Abuse and Exploitation Policies. (See Appendix B.) The Assistant Superintendent of Developmental Services shall ensure that copies of the Pennhurst Physical Abuse and Exploitation Policies are placed in a proper and conspicuous place within each living area.

(c) Psychological Abuse. Psychological abuse includes but is not limited to: (a) harrassment, (b) screaming, (c) name-calling, (d) obscene or cursing language directed at a resident, (e) threats damaging to a resident's self-respect.

(d) Investigation of Physical and Psychological Abuse. Pennhurst Security Police shall begin investigating all suspicious or unexplained injuries and alleged resident abuse upon report of the alleged incidents. Upon receipt of said report, the Pennhurst Security Police shall immediately notify the Superintendent or his designee and the Special Management Unit.

Copies of all investigative reports regarding cases of abuse shall be delivered to the Superintendent of Pennhurst, the Special Management Unit, and the State Police, within 48 hours after completion of the investigation. Pennhurst Security Police shall follow Department of Public Welfare guidelines for investigating instances of alleged abuse.

8. Commonwealth defendants are hereby enjoined to exert the maximum effort in enforcing at Pennhurst the Department of Public Welfare regulations set forth in Appendix C and are enjoined as follows:

a. That mechanical restraints controlling involuntary movement or lack of muscular control due to organic conditions to be employed only as part of an individual program of such restraints, and only when necessary to (1) prevent injury to self or others, or (2) promote normative body positioning and physical functioning.

b. That restraints shall be used to control acute or episodic, aggressive behavior only when a resident is

acting in such a manner as to be a clear and present danger to self or others and only when less restrictive measure and techniques have been proven to be less effective.

c. That mechanical restraints may be used only upon the order of a qualified mental retardation professional for a period not to exceed two hours; that the resident must be checked every fifteen minutes and must be examined by a physical before the initial order is renewed.

d. That chemical restrains may be administered only upon the order of a physician.

e. That seclusion (involuntary placement of a resident alone in a locked enclosure) is prohibited in all cases except where it is apparent that there exists a clear and present danger to the resident, other residents or staff and all other less restrictive methods have failed or have been deemed inappropriate.

f. That individual program plans shall require and document that all possible attempts be made at preventing assaultive behavior by positive, constructive intervention.

g. That acts of abuse by employees directed at residents are absolutely prohibited and are cause for disciplinary action including dismissal.

h. That an abuse act is any action which may cause or causes physical or emotional harm or injury and includes any wilful action which violates the regulations on use of restraints.

i. All Pennhurst employees shall observe the Department of Public Welfare regulations on the "Use of Restraints in Treating Patients/Residents" and "Personnel Rules and Institutional Policy on Acts or Abuse Against Patients/Residents." (See Appendix C.)

j. Restraint Reports. The Ward Nurse shall prepare a report for each instance of restraint at the end of his/her shift and shall submit all reports to the Special Assistant to the Superintendent daily.

k. Follow-Up On Chemical Restraint. The staff of the Special Assistant to the Superintendent shall:

a) Verify that a physician has ordered the chemical restraint.

b) Verify that Pennhurst policies were following in using the chemical restraint.

l. Follow-Up On Mechanical Restraint. The staff of the Special Assistant to the Superintendent shall:

a) Interview the resident who was restrained.

b) Interview the staff who applied and witnessed the application of the restraint.

c. Verify the correct use of the restraint. In addition, the Special Management Unit shall regularly and randomly monitor the above procedure.

m. Results of Report. The Special Assistant to the Superintendent shall submit copies of all reports regarding abuse of restraints to the Superintendent and the Special Management Unit within 24 hours of the follow-up interview.

9. Commonwealth defendants are hereby enjoined from:

(a) Administering excessive or unnecessary medications to Pennhurst residents;

(b) Using medication as punishment, for the convenience of the staff, as a substitute for programming, or in quantities that interfere with a Pennhurst resident's functioning;

(c) Failing to ensure that only appropriately trained staff are allowed to administer drugs to residents;

(d) Failing to provide training programs to staff who administer drugs to residents. The nature of such training programs, and the qualifications to be required of staff members who administer drugs to residents shall be established in accordance with this amended Order.

(e) Administering drugs to residents on a p.r.n. basis. Written policies and procedures governing the safe administration and handling of medications shall be established pursuant to the guidelines set forth in paragraph 3.4 of section II of this amended Order, infra.

(f) Failing to monitor and to provide for at least monthly reviews by a physician of each resident's medications.

(g) Review of Medical Records. All medical records shall be reviewed monthly by the prescribing physician to determine if the medication regimen is appropriate and consistent with the needs of the Pennhurst resident and the Orders of this Court. Each month the following procedures shall occur:

1) The Pennhurst Medical Director shall randomly review 5% of Pennhurst residents' medical records.

2) An independent physician approved by the Special Management Unit shall randomly review 10% of Pennhurst residents' medical records.

(h) Medical Director's Report. Each month the Pennhurst Medical Director and the independent physician approved by the Special Management Unit shall separately submit a report which shall specify whether medication is:

1) Given in necessary quanities.
2) Not used for punishment or restraint.
3) Not used for staff convenience.
4) Not used in amount that interferes with the resident's overall functioning.
5) Not used as a substitute for programming.
6) Given only by appropriately trained staff.
7) Not used on an "as needed" basis.
8) Reviewed biweekly by the prescribing physician.
9) Consistent with the client's individual plan.
10) Consistent with the physician's case management plan.

(i) Qualifications for Administering Medication. The Medical Director, Director of Nursing, Director of Staff Development and the Director of Professional Standards of Compliance shall:

1) Review the qualifications of every staff member who administers medication in compliance with Act 151, the Professional Nursing Act & Practical Nurse Law.
2) Post a list of qualified persons in every living area. Only those on the list shall administer

medication. The list shall be updated at least every six months.

10. Commonwealth defendants are enjoined from failing to provide a program of medical and health-related services for Pennhurst residents which ensures accessibility, quality and continuity of care for physical illness or injury in accordance with the procedures and standards set forth in this amended Order.

(a) Health Care Procedures. Any complaint from a Pennhurst resident of nausea, pain or other discomfort shall be recognized and brought to the attention of the nurse immediately who shall conduct a follow-up examination. The nurse shall notify the physician if further treatment is needed. The physician shall be responsible for providing or obtaining that treatment. Changes in the functioning of a Pennhurst resident shall not be overlooked. The continuous practice of good health care shall be assured by the following procedures:

(b) Each Pennhurst resident shall receive a physical examination by appropriate licensed specialists at least annually. This service shall include but not be limited to speech, audiology, physical therapy, occupational therapy, and neurology. Examinations may be more frequent if the physician or other qualified person determines the need.

(c) Dental examinations shall be provided every six months. Any further dental services shall be provided accoring to the individual needs of each Pennhurst resident.

(d) Any Pennhurst resident who needs diagnostic therapeutic or medical procedures not available at Pennhurst shall receive them from outside resources.

(e) The Pennhurst Medical Director shall maintain a comprehensive examination schedule which shall coincide with each resident's Annual Program Review schedule.

(f) The Ward Clerk shall notify the Ward Nurse and Unit Director when examinations are due.

(g) The Ward Clerk shall notify the Superintendent by telephone and memorandum when an examination is 15 days overdue.

(h) Therapeutic services shall be provided on an individual basis.

(i) All matters related to the health of each resident shall be recorded in his/her ward file.

11. Commonwealth defendants are hereby enjoined from failing to provide individualized adaptive wheelchairs to all physically handicapped Pennhurst residents who need them, in accordance with the procedures and standards set forth in this amended Order. Each and every individual resident shall be continuously evaluated to ascertain the need for such equipment.

(a) The Provision of Adaptive Wheelchairs and Other Orthotic Devices. Each resident needing an adaptive wheelchair or other orthotic device shall be provided with such device within 30 days of identification of the need for same, and necessary adaptations or modifications to such devices shall be effected within 30 days of identification of such a need. (An orthotic device is one which serves to protect, restore or improve functioning.)

(b) Procurement and modification of adaptive wheelchairs and other orthotic devices shall be the combined responsibility of the Physical Therapy, Occupational Therapy, and Maintenance Departments. Consultants shall be retained as necessary to provide technical assistance concerning the adaptation of wheelchairs and other orthotic devices.

(c) The Program Manager of each living area shall ensure that the resident's name is placed on his/her wheelchair or orthotic device in a reasonably conspicuous place.

(d) The Program Manager of each living area shall ensure that a record of the date(s) of procurement and modification of the device(s), as well as maintenance instructions, are placed in the resident's ward file.

(e) The Program Manager shall ensure that each resident is using his/her own chair and that the chair is working properly. In addition, the program manager shall ensure that each resident uses his/her wheelchair and/or orthotic device on a daily basis according to the resident's level of tolerance

and recommendations from the responsible therapists and physicians.

(f) Any person who observes a Pennhurst resident in the wrong chair or identifies a chair in need of modification or repair shall report it to the Program Manager immediately.

12. Commonwealth defendants are hereby enjoined from feeding any Pennhurst resident in the supine position or in any position less than the maximum upright position consistent with his or her capabilities and handicaps, as determined in accordance with this Order.

Positioning of Residents at Mealtime.

(a) The responsible physician shall determine the proper mealtime position for residents who are not fully upright and recommend, if necessary, a sitting tolerance program to assist the resident in achieving that position. Once the proper position has been achieved, the Occupational Therapist shall evaluate the client's oral motor functions and provide the appropriate program. The program shall be included in the resident's ward chart. Each resident with a medical limitation on sitting shall be evaluated quarterly to determine whether his/her position is appropriate, and whether a change in positioning is needed. Documentation of the evaluation shall be placed in the resident's ward file.

(b) A photograph of each resident in his/her proper mealtime position shall be placed where staff feeding the resident can easily see it.

(d) The Program Manager in each living area shall assure that each resident eats in his/her proper mealtime position. The Charge Aide shall immediately notify the Unit Director if any resident is found in any position other than that prescribed by the physician.

13. Commonwealth defendants are hereby enjoined from denying any Pennhurst resident programmed activities as punishment.

14. Commonwealth defendants are hereby enjoined to take every precaution to keep every Pennhurst building currently housing residents clean, odorless, and insect-free at all times, in accordance with the procedures set forth in this Order.

Sanitation. The following procedures shall be implemented in order to ensure adequate cleanliness and sanitation:

(a) The Director of Housekeeping and Unit Director shall maintain a schedule of housekeeping responsibilities which shall be posted in every living area.

(b) All areas shall be swept and mopped by members of the housekeeping staff daily.

(c) In the dining area, tables shall be cleaned and floors swept after each meal.

(d) The Program Coordinator shall make a thorough inspection of the living area daily and notify the Director

of Housekeeping of any cleaning that may be required. If a correction is not made within 24 hours, the Charge Aide shall send an Action Check Form to the Unit Director and the Superintendent.

(e) In areas where residents are incontinent, the Charge Aide shall make rounds every hour to ensure that the residents and the areas are kept clean.

(f) Any person observing urine or feces on the floor or on a resident shall notify the Charge Aide, who shall ensure that the resident and area are cleaned as soon as possible. If the resident is not cleaned within 30 minutes, and if the area is not cleaned within 60 minutes, the Charge Aide shall notify the Unit Director who shall ensure that appropriate action is taken.

(g) Any person detecting an area permeated with foul odors shall notify the Charge Aide, who shall ensure that the area is sanitized and that the odor is eradicated.

(h) Leaking or clogged toilets and sinks and bathing facilities shall be repaired as soon as possible after discovery.

(i) Each day the Charge Aide shall thoroughly inspect the living area for infestations. If infestations are found, the Charge Aide shall notify the Director of Housekeeping.

If no corrective action is taken within 24 hours, the Charge Aide shall notify the Unit Director and Superintendent.

(j) All employees shall make certain that residents are protected from harmful chemicals used for sanitizing or other health-related reasons.

15. Commonwealth defendants and County Defendants are enjoined to ensure that all class members receive the protections set forth in paragraphs 7-14, supra, insofar as they are applicable.

16. All bulletins, memoranda, and directives of official policy issued by the defendants in connection with the implementation of this Court's Orders shall, upon issuance, be sent to counsel for each of the plaintiffs.

17. Commonwealth and County defendants are enjoined and prohibited from preventing any of their agents or employees from notifying the Court, plaintiffs' counsel, or any other entity of matters affecting the implementation of this Court's Orders.

18. The Special Management Unit established and maintained by the Office of Mental Retardation, Pennsylvania Depart-

ment of Public Welfare, shall have the duties and responsibilities set forth in this and other Orders of the Court, in addition to such non-conflicting duties and responsibilities as may be assigned by the Deputy Secretary for Mental Retardation.

19. In order to assist the employees at Pennhurst in carrying out their responsibilities to the residents of the institution, Commonwealth defendants, through their Special Management Unit, shall ensure the implementation of the following procedures:

(a) Continued orientation to the Orders of the Court herein shall be provided to all current Pennhurst employees, and such orientation shall be included in regular pre-service training for all new employees.

(b) A notice of resident rights and procedures for protecting such rights shall be posted within all Pennhurst living areas by the Unit Director and in all service areas by respective Department Heads. (See Notice in Appendix A.)

20. Employees. The employees of Pennhurst are in a position to have a direct and lasting influence on the lives of Pennhurst residents. Consequently, every Pennhurst employee shall be responsible for reporting any observed instance of non-compliance with the Orders of this Court. The Commonwealth defendants shall not attempt to prevent Pennhurst employees from reporting any such

instances of non-compliance with this Court's Orders or punish Pennhurst employees for reporting any such instances of non-compliance with this Court's Orders.

21. Reports and Checklists Required at Pennhurst

(a) Action Check Form. This form (See Appendix D.) shall be used solely for the reporting of violations of the Orders of this Court. It shall include:

1) The date and time of observation.
2) A description of what was observed.
3) The name and telephone number of the person reporting the violation.
4) Space for the Superintendent to indicate investigatory responsibility and date of assignment.

The completed form shall be sent to the Superintendent.

(b) Follow-Up Report Form. This form (See Appendix E.) shall be used to:

1) Verify facts contained in the original report.
2) Indicate probable causes and person(s) responsible.
3) Outline corrective steps and time schedules for carrying them out.

A member of the Management Staff responsible for the follow-up procedure shall complete and return the form to the Superintendent within 48 hours of the reported incident. Copies of the report shall be sent to:

1) The reporter of the observed incident.

2) The Special Assistant to the Superintendent.

3) The person conducting the investigation.

4) The Special Management Unit.

(c) Superintendent's Response to Written Reports. Within 10 days of the follow-up report, a member of the staff of the Special Assistant shall verify results of the original report and the subsequent follow-up and investigation (See Appendix E.). The Superintendent shall review all reports of the incident within 24 hours. The Superintendent shall ensure that the appropriate corrective procedures including disciplinary action, have been carried out. If the result of findings in the investigation of a complaint reveals negligence or non-cooperation, the person responsible shall be subject to Department of Public Welfare disciplinary action which may include:

1) Formal reprimand.

2) Reassignment.

3) Suspension.

4) Termination.

NOTE: If such disciplinary action is warranted, the employee involved shall retain all rights according to his/her respective grievance procedures.

When all remedies have been fully implemented, a total report shall be submitted by the Superintendent to the Special Management Unit and to the Court.

22. The Role of the Special Assistant to the Superintendent. The Special Assistant to the Superintendent shall be responsible for the Superintendent for the orderly monitoring of all matters related to the Orders of this Court. A group of persons, supervised by the Special Assistant, shall assist in this effort. This group shall:

(a) Not be responsible for service provision.

(b) Report to the Superintendent through the Special Assistant.

(c) Receive copies of all complaints from Pennhurst employees about violations of the Orders of this Court.

(d) Verify for the Superintendent that steps have been taken to correct specific problems.

(e) Conduct random site visits to living areas to review compliance with mandated procedures.

(f) Maintain a file of all complaints received, all investigative reports and written responses from the Superintendent.

(g) Provide copies of reports and findings to the Special Management Unit on a weekly basis.

23. Site Visits. Groups concerned about Pennhurst residents shall be permitted to make site visits at reasonable times and places to review compliance with the procedures mandated above. Such visits shall be arranged with the Superintendent.

Groups wishing to make unannounced site visits shall report to the Office of the Superintendent of Pennhurst before inspecting the area or program in question.

24. Provision of Ramps. Ramps shall be maintained at Pennhurst buildings "D" and "T" to ensure their accessibility to residents.

25. The Commonwealth defendants shall provide continuing support and assistance to the class members as they move into community facilities. That support shall include, but not be limited to, planning, monitoring, financial and technical assistance, and training of community staff.

26. The Commonwealth defendants shall continue to provide funds to the counties for the employment of sufficient numbers of case managers and case management supervisors, and for all necessary support services for these employees.

27. The Commonwealth defendants are enjoined to continue to review the Individual Habilitation Plans developed for class members by their respective planning and assessment teams in order to ensure that such IHPs comport with this Court's Orders. Commonwealth defendants are further enjoined to inspect and monitor the community living facilities to which class members are transferred in order to ensure that such facilities are safe, sanitary, and beneficial to the individual's habilitation.

The Commonwealth defendants shall perform these functions as set forth in the agreement of February 2, 1982 between the Commonwealth defendants and the formerly existing Office of the Special Master (See Dkt. Nos. 1465-71).

28. The County defendants shall provide continuing support for the class members in accordance with the regulations of the Department of Public Welfare, Title 5200, County Mental Health and Mental Retardation Program Service Content of the Program, including 5200 Appendix IV, Mental Retardation Responsibilities, and any other regulations promulgated by the Department under 50 P.S. § 5201(2) relating to the County Mental Retardation Program.

29. The County defendants shall provide support services for sufficient numbers of case managers and case management supervisors to implement the Orders of this Court with respect to those class members for whom they are responsible.

30. The case managers and case management supervisors shall be responsible for serving class members. They shall:

(a) Implement those case management activities identified in the IHP (Individual Habilitation Plan) Guidelines as set forth in the Placement Procedures for Pennhurst Class

Members (See Appendix F.) These placement procedures shall not be revised or amended without prior approval of the Court.

(b) Assure access to the individual determination process, as appropriate, for each class member.

(c) Ensure the development and implementation of all services as prescribed in the Individual Habilitation Plan.

31. Training these case managers and case management supervisors shall be the responsibility of the Special Management Unit. Training sessions shall be scheduled periodically in order to acquaint newly employed case managers with mandated procedures and to update the information provided to incumbent employees.

32. In the absence of a parent/guardian, or at their request, or upon the request of a class member, the Commonwealth defendants shall assign a trained Certified Advocate to the class member, in accordance with the Placement Procedures (See Appendix F.).

33. The relocation of any class member, including those currently at Pennhurst, must proceed consistent with the Placement Procedures and thus be submitted to the Special Management Unit for review and approval.

34. Since the placement of a class member in appropriate community living facilities (CLFs) depends upon the careful development of an Individual Habilitation Plan (IHP), the following procedures must be followed in order to make certain that each class member's IHP provides for minimally adequate habilitation in the least restrictive environment in accordance with this Court's Orders.

Before any aspect of the planning process begins, the resident, parent/guardian, and/or certified advocate shall be notified that they have the opportunity for full participation in the development of the TIHP and IHP.

3 . The Planning and Assessment Team (including, but not limited to, the class member, case manager, parent/guardian and/or

certified advocate) shall meet to develop an Individual Habilitation Plan (IHP) for habilitation of the class member in an appropriate community living facility (CLF). The IHP shall be developed in accordance with the Placement Procedures referred to in this Order, supra, incorporated herein by reference (See Appendix F.), and shall include plans for the CLF and all supportive services, and emergency and respite care where necessary. Adequate notice of all Team meetings shall be given to all Team members. Any member of the Team who has received notice of a Team meeting and fails or refuses to participate shall continue to receive notice of future Team meetings, but meetings may proceed without such member's participation. Team members shall have access to all records and documents necessary for developing the IHP.

In the event of disagreement among Team members as to the provisions of the IHP, mediation shall be attempted in accordance with the Placement Procedures.

36. The Court has appointed a Master, hereinafter referred to as the Hearing Master, who shall have the responsibility to conduct hearings as provided in this Order. The Hearing Master shall be independent of all parties to this action and shall be subject only to the direction of the Court.

The Hearing Master shall engage such support staff as is approved by the Court upon recommendation of the Hearing Master and shall arrange for office and hearing space subject to the

approval of the Court. The Master and staff shall be compensated by Commonwealth defendants at a rate to be set by the Court. The expenses of the Master including, but not limited to, office and hearing space, supplies, and equipment, shall be borne by Commonwealth defendants.

37. In the case of a proposed transfer of any class member to a community living facility when the special management unit has approved the TIHP and the community services are in place, ready to receive the class member in accordance with the TIHP, the County Administrator shall notify the class member, Commonwealth, parent/guardian and/or certified advocate that the TIHP will be implemented and the class member will move to the community living facility in accordance with the Placement Procedures. The notice shall be written, and a copy of the TIHP shall be attached thereto. This notice shall be delivered in person, or by certified mail, return receipt requested, and shall contain the location and description of the community living facility and shall advise all parties how they may make arrangements to visit the CLF in the event they have not done so during the planning process. The notice shall provide that the class member, parent/guardian, or certified advocate may, by written demand delivered to the Hearing Master within 7 days of receipt of the notice, demand a hearing to determine whether the living arrangements and services being provided the class member in the institution are more beneficial

to the class member's habilitation than the living arrangement and services which have been made ready in the community in accordance with the TIHP. In the event the Hearing Master receives no demand for a hearing within the 7-day period, the County Administrator shall proceed with the arrangements transferring the class member to the designated community living facility. No notice of placement shall be issuedunless and until the class member has made a sufficient number of pre-placement visits to the proposed CLF so that a judgment can be made as to its appropriateness; such visits shall be made at the discretion of the County Administator and are not subject to the procedures required herein.

38. Upon receipt of a demand for a hearing, the Hearing Master shall immediately notify the class member, parent/guardian certified advocate, County, Commonwealth, and any attorney who may have been provided for the indigent classmember by the Commonwealth, of the date for the hearing, which hearing shall commence within 10 days of the date on which the hearing demand was received.

The Hearing Master shall have the power to fix the time and place for beginning and closing the hearing, and shall conduct the hearing according to such rules as shall be determined to be beneficial to the rights and needs of the retarded individual. The Hearing Master may require the production of evidence and rule upon the admissibility of evidence, and shall have the power to

put witnesses under oath, and may examine witnesses. A tape recording of each hearing shall be made and preserved for a reasonable time by the Hearing Master. The parties to the hearing may provide a licensed stenographer at the hearing at their own expense.

The class member, parent/guardian, certified advocate, the County, and Commonwealth shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the resident's habilitation. Attendance of witnesses at the hearing may be procured by the issuance and service of subpoenas as provided in Rule 45 of the Federal Rules of Civil Procedure, or by order of the Hearing Master.

The Hearing Master shall make findings and set forth reasons as to whether the living arrangements and services being provided the class member in the institution are more beneficial to the resident's habilitation than the living arrangements and services which have been made ready in the community in accordance with the TIHP. In making such a finding, the Hearing Master shall be guided by the presumption in favor of placing individuals in community living facilities, as set forth by the Court of Appeals for the Third Circuit.

Within 5 days of the completion of the hearing, the Hearing Master shall file with the Clerk of this Court a written report setting forth findings and reasons as described above, and shall send copies of the report to all parties to the hearing. The Hearing Master shall, in preparing the report, take such measures

as may be necessary for the protection of the retarded person's privacy.

In the event the class member, parent/guardian, certified advocate, County or Commonwealth takes exception to the Hearing Master's findings, said exception must be filed with the Court within 10 days of the date that the Hearing Master's report is filed with the Court. Copies of such exceptions must be served upon the Hearing Master and upon all other parties to the hearing; such other parties may file a written response with the Court within 5 days of their receipt of same.

In the event the Hearing Master determines that the class member should move to the designated community living facility, the County Administrator shall proceed with the arrangements transferring the resident to the CLF. In the event the Hearing Master determines that the living arrangements and services being provided in the institution are more beneficial to the habilitation of the class member than those living arrangements and services which have been made ready in the community in accordance with the TIHP, the County Administrator shall terminate the arrangements for transferring the class member to the designated community living facility.

Whenever the Hearing Master determines that the institution in which a class member resides is more beneficial to his or her habilitation than the proposed community living facility, if he also determines that other living arrangements and services

in the community can be more beneficial to the class member's habilitation than the institution he shall direct the County Administartor to reinitiate the planning process in accordance with the procedures set forth in this Order.

In the event any class member who has moved to a CLF pursuant to this Order is not progressing in accordance with his or her IHP, a review of the IHP and program shall be initiated by the Planning and Assessment Team. In the event and Planning and Assessment Team recommends that the class member should be returned to Pennhurst or be placed in another institution operated by the Commonwealth defendants, the County Administrator, subject to the approval of the Special Management Unit, shall not proceed with the return of the class member to an institution except in accordance with paragraphs 39 and 40, infra.

39. Except as hereinafter provided, defendants are hereby enjoined from recommending or in any way counseling that any individual be committed or admitted to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst, and from advancing in any way any application for admission to Pennhurst, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any retarded person to Pennhurst.

A County defendant shall not recommend the admission of any retarded person to Pennhurst without first having made a written determination setting forth:

(1) The results of an in-depth study of the living arrangements and services which will be most beneficial to the habilitation of that person;

(2) In the event it is determined that a community living facility will not be beneficial to the habilitation of that person, the reasons for such conclusion, together with the efforts which have been made to find an alternative institution for that person in the relevant geographic area; or

(3) In the event it is determined that a community living facility will be beneficial to the habilitation of that person but no appropriate community living facility is presently available, the reasons for such conclusion, together with:

(a) the efforts which have been made to provide an appropriate community living facility for that person; and

(b) the reasons why this is an extreme situation requiring admission to Pennhurst until the appropriate community living facility is made available.

The County shall notify the Hearing Master of such recommendation by delivering to him a copy of the written determina-

tion as set forth above. Immediately upon receipt of such document, the Hearing Master shall notify the retarded person, parent/guardian, certified advocate, County, Commonwealth, and any attorney who may have been retained on behalf of the retarded person or who may have been provided for the indigent retarded person by the Commonwealth, of a hearing to commence within 10 days of said notice. The purpose of the hearing shall be for the Hearing Master to make findings as to the living arrangements and services which will be most beneficial to the habilitation of that person, and

(a) In the event the Hearing Master determines that a community living facility will not be beneficial to the habilitation of the retarded person, the Hearing Master shall determine whether an alternative institution in the relevant geographic area is available. If such institution is available, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to that institution. If no such institution is available, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to Pennhurst, or

(b) In the event the Hearing Master determines that a community living facility will be beneficial to the habilitation of the retarded person, the Hearing Master shall determine whether an appropriate community living facility is available. If such a community living facility is available, the County Administrator

shall immediately make arrangements to place the person in that facility. If no such community living facility is presently available, the County Administrator shall make such arrangements as the Hearing Master determines are necessary for the person's habilitation until the appropriate community living facility is made available.

The retarded person, parent/guardian, certified advocate, County, and Commonwealth shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the retarded person's habilitation. Attendance of witnesses may be procured as provided in paragraph 38, supra.

The Hearing Master shall have all powers and duties provided in paragraph 38, supra and shall prepare a written report setting forth findings and reasons as described above. In making such findings, the Hearing Master shall be guided by the presumption in favor of placing individuals in community living facilities as set forth by the Court of Appeals for the Third Circuit. Within 5 days of the completion of the hearing, the Hearing Master shall file said report with the Clerk of this Court, sending copies of the report to all parties to the hearing, and shall take such measures in preparing the report as may be necessary for the protection of the retarded person's privacy.

In the event the retarded person, parent/guardian, certified advocate, County, or Commonwealth takes exception to the Hearing Master's findings, said exceptions must be filed with the Court

within 10 days of the date of the filing of the Hearing Master's report with the Court. Copies of such exceptions must be served upon the Hearing Master and upon all other parties to the hearing; such other parties may file a written response with the Court within 5 days of their receipt of same.

40. Except as hereinafter provided, defendants are hereby enjoined from recommending, or in any way counseling, that any class member be committed or admitted to any institution operated by the Commonwealth defendants, and from petitioning for the commitment of any such individual to any such institution, and from advancing in any way any application of any such individual to any such institution, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any such individual to any such institution.

A County defendant shall not recommend the admission of any class member to any institution operated by the Commonwealth defendants without first having prepared a TIHP and planned a community living facility for that person in accordance with the Order of the Court and the above mentioned Placement Procedures. If, after preparing the TIHP and planning for a community living facility, the County defendant intends to recommend admission to an institution operated by the Commonwealth defendants, the County defendant shall prepare a written determination setting forth the following:

(a) In the event it is determined that a community living facility will not be beneficial to the habilitation of that person, the reasons for such conclusion.

(b) In the event it is determined that a community living facility will be beneficial to the habilitation of that person, but that no appropriate community living facility is presently available, the reasons for such conclusions, together with:

(a) the efforts which have been made to provide an appropriate community living facility for that person; and

(b) the reasons why this is an extreme situation requiring admission to an institution until the appropriate community living facility is made available.

The County shall notify the Hearing Master of such recommendation by delivering to him a copy of the written determination as set forth above. Immediately upon receipt of such document, the Hearing Master shall notify the retarded person, parent/guardian, certified advocate, County, Commonwealth, and any attorney who may have been retained on behalf of the retarded person or who may have been provided for an indigent retarded person by the Commonwealth, of a hearing to commence within 10 days of said notice. The purpose of the hearing shall be for the Hear-

ing Master to make findings as to the living arrangements and services which will be most beneficial to the habilitation of that person, and

(a) In the event the Hearing Master determines that the institution will be more beneficial to the habilitation of the retarded person than a community living facility, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to that institution.

(b) In the event the Hearing Master determines that a community living facility will be more beneficial to the habilitation of the retarded person than the institution, the Hearing Master shall determine whether an appropriate facility is presently available. If such a community living facility is available, the County Administrator shall immediately make arrangements to place the person in that facility. If no such CLF is presently available, the County Administrator shall make such arrangements as the Hearing Master determines are necessary for the person's habilitation until the appropriate community living facility is made available.

The retarded person, parent/guardian, certified advocate, County, and Commonwealth shall have the opportunity to present such evidence as the Hearing Master may determine relevant

to the issue of the retarded person's habilitation. Attendance of witnesses may be procured as provided in paragraph 38, supra.

The Hearing Master shall have all powers and duties provided in paragraph 38 and shall prepare a written report setting forth findings and reasons as described above. In making such findings, the Hearing Master shall be guided by the presumption in favor of placing individuals in community living facilities, as set forth by the Court of Appeals for the Third Circuit. Within 5 days of the completion of the hearing, the Hearing Master shall file said report with the Clerk of this Court, sending copies of the report to all parties to the hearing, and shall take such measures in preparing the report as may be necessary for the protection of the retarded person's privacy.

In the event the retarded person, parent/guardian, certified advocate, County, or Commonwealth takes exception to the Hearing Master's findings, said exception must be filed with the Court witin 10 days of the date the Hearing Master's report is filed with the Court. Copies of such exceptions must be served upon the Hearing Master and upon all parties to the hearing; such other parties may file a written response with the Court within 5 days of their receipt of same.

IT IS FURTHER ORDERED:

1. The Order of May 28, 1980 is hereby AMENDED as herein set forth.

2. The Orders of May 17, 1978 and April 24, 1980, as AMENDED herein, remain in full force and effect.

3. All other Orders of this Court not specifically vacated by this Court remain in full force and effect.

4. Any party objecting to any provision of this Order shall file its objections in writing on or before October 1, 1983, a hearing concerning any such objections to be scheduled thereafter.

RAYMOND J. BRODERICK, J.

APPENDIX A

[App. to Ex A]

PROCEDURES FOR PROTECTING THE HUMAN AND CIVIL RIGHTS OF PENNHURST RESIDENTS WHILE THEY LIVE AT THE INSTITUTION

The procedures described below are in compliance with the Court Orders issued by Federal Judge Raymond Broderick. Their purpose is to protect the human and civil rights of Pennhurst residents while they live at the State Center.

1. Abuse. All persons shall take every precaution to prevent physical or psychological abuse, neglect, or mistreatment of any Pennhurst resident. The Pennhurst Abuse Policy and state regulations regarding abuse must be followed. Any person noting abuse, neglect, or mistreatment of a resident must report the incident to the appropriate supervisor and the Superintendent. Reports shall be made by phone and on the Action Check Form.
2. Use of Restraints. State regulations and Pennhurst policies on the use of restraints must be followed. Specifically:

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those observations. The nurse shall conduct an immediate follow-up and shall notify the resident's physician of the problem. The physician shall be responsible for obtaining appropriate treatment for an illness.

5. Wheelchairs and other orthotic devices. Any resident who requires a wheelchair or other orthotic device shall be given free access to his/her own such device(s). These wheelchairs and devices shall be modified to meet each resident's individual needs as determined through individual evaluations.

6. Mealtime Positioning. Residents who cannot eat in completely upright positions shall receive their meals in as close to an upright position as possible, considering their particular disabilities. A photograph of the appropriate mealtime position for each resident and specific mealtime instructions, as approved by the physician, shall be posted where the resident eats his/her meals.

7. Denial of Program Activities. Residents may never be denied participation in programmatic activities for purposes of retribution and punishment.

8. Sanitation. Every living area for clients shall be kept clean, free of offensive odors, and free of infestation by insects and vermin.

* Non-compliance with any procedure by any person is a serious matter which may result in:

a. Disciplinary action by the Pennhurst Administration,

Note: If such disciplinary action is warranted, the employee involved shall retain all rights according to his/her respective grievance procedures.

b. Possible criminal charges,

c. A Federal contempt citation, and/or

d. A civil action seeking damages under Section 504.

APPENDIX B

POLICY ON ABUSE OF CLIENTS BY EMPLOYEES

It is inherent in the nature and dignity of each individual that they be accorded certain human rights. A handicap in no way lessens these rights. As employees of Pennhurst Center, it is our duty to recognize the rights of all those people we deal with, but most especially with the clients, whom we have been hired to care for, instruct, and supervise. Accordingly, we must at all times deal with each client in the most humane manner possible. To this end, no employee may, at any time, commit an act of physical or psychological abuse against any client. An abusive act is any act which causes or may cause physical or mental pain in a client and which is done for the purpose of controlling or punishing him or instilling fear of the employee in the resident.

Abusive acts by employees will be dealt with most severely, in accordance with the employees rules and regulations of Pennhurst Center.

Any employee who abuses a resident will be subject to dismissal.

Any employee who witnesses an act of abuse and who does not report it immediately to his supervisor will also be subject to similar disciplinary action.

Questions may arise as to what actions constitute abuse of a client. A common-sense application of the definition outlined above should answer most questions. Actions such as striking or kicking a client, restraining a client improperly or without authorization, and other such actions can be seen as causing physical pain to a client. As such, they are strictly forbidden! All actions in which employees engage with clients must have as their legitimate end, the healthful, proper and humane programming and treatment of that client. Painful abuse has no place in this philosophy of total care and habilitation. Acts such as teasing, humiliating or degrading a client, while not physical in nature, are no less painful; they constitute severe psychological abuse and will be dealt with no less severely.

Occasionally, employees might be called upon to defend themselves from disturbed clients. This is a time when each employee must show maximum self-control and discipline to insure that he or she use only the least amount of force necessary in a given situation. An aggressive lashing out at a disturbed client will, in most cases, only worsen the situation. When called upon to restrain a client, in accordances with proper restraint procedures, the least amount of force necessary, applied intelligently, will insure that a client's rights are not violated. The employee who feels it necessary to defend himself in an aggressive, offensive manner should be ever mindful of the requirement thus placed on him, to prove conclusively that no other course of action remained open to him. Self-defense through action in violation of the definition of abuse outlined above will be excused only under the most unusual circumstances. Intelligent self-defense that does not seek to cause harm to the client will, inevitably, not only protect the employee from harm himself, but make it easier to control and calm the client who is disturbed.

Each employee has an obligation to be familiar with the policy on abuse and to adhere to the regulations concerning abuse. Each employee also has, as mentioned above, an equal responsibility to the protect the rights of the clients from others who may seek to violate those rights.

s is a prime responsibility of us all, as many clients cannot or will not ak up for themselves. Simple human decency dictates that we do not allow fellow employees to perpetrate actions upon the clients which we know are ng. We are obliged to report any incident we observe that seems irregular suspicious. With cooperation from all employees at all levels, we will be e to guarantee the clients of Pennhurst the respect and dignity that is ir right as our fellow human beings.

Employee Rules and Regulations

Physical abuse or mental abuse of clients, is absolutely unpardonable. Such acts are cause for disciplinary action or dismissal, and possible criminal prosecution. Teasing, threatening, swearing, ridiculing, and similar acts constitute mental abuse.

The plea of self-defense in violation of the above rules on the part of any employee will be given consideration only under the most unusual circumstances and only when such self-defensive action can be conclusively proven.

An employee witnessing an act of physical or mental abuse to a client who does not report it to an immediate superior will be considered an accessory and will be liable to the same disciplinary action as the person committing the act.

Pennhurst Center Spring City, PA 19475	Category: Abuse of Resident Number: 207.1

Title: Policy and Statement of Principle Regarding Abuse

It is the policy of Pennhurst Center:

That no employe may, at any time, commit an act of physical or mental abuse against any resident.

It is inherent in the nature and dignity of each individual that they be accorded certain human rights. A handicap in no way lessens these rights. As employees of Pennhurst Center, it is our duty to recognize the rights of all those whom we have been hired to care for, instruct, and supervise. Accordingly, we must at all times deal with each resident in the most humane manner possible.

Date of Last Revision _____ Revision Number _____

Authorized by Executive Committee Date October 24, 1977

Approved by Superintendent C. Dixon Hamby Ed.D.

Pennhurst Center Spring City, PA 19475	Category: Abuse of Resident Number: 207.2

Title: Abuse Defined

It is the policy of Pennhurst Center:

That abuse be perceived and defined as "Any act which causes or may cause physical or mental pain in a resident and which is done for the purpose of wrongfully controlling him, inappropriately punishing him or instilling fear of the employe in the resident."

Questions may arise as to what actions constitute abuse of a resident. A common-sense application of the definition outlined above should answer most questions. Actions such as striking or kicking a resident, restraining a resident improperly or without authorization, and other such actions can be seen as causing physical pain to a resident. As such, they are strictly forbidden! All actions in which employees engage with residents must have as their legitimate end, the healthful, proper and humane programming and treatment of that resident. Painful abuse has no place in this philosophy of total care and habilitation. Acts such as teasing, humiliating or degrading a resident, while not physical in nature, are no less painful: they constitute severe mental abuse and will be dealt with no less severely.

Date of Last Revision _____ Revision Number _____

Authorized by Executive Committee Date October 24, 1977

Approved by Superintendent [signature]

Pennhurst Center Spring City, PA 19475	Category: Abuse of Resident Number: 207.3

Title: Resident Discipline as it Relates to Abuse

It is the policy of Pennhurst Center:

That the definition of "abuse" does not prohibit or contradict the concept of discipline thoughtfully and properly applied. Approved forms of discipline such as those outlined in therapy programs and behavior shaping programs are not considered abuse. Discipline is a necessary skill that all people must learn, and is one which responsible employees cannot ignore.

Date of Last Revision _____ Revision Number _____

Authorized by Executive Committee Date October 24, 1977

Approved by Superintendent C. Donner Worthington Ed.D.

Pennhurst Center Spring City, PA 19475	Category: Abuse of Resident Number: 207.4

Title: Employe Self Defense as it Relates to Abuse

It is the policy of Pennhurst Center:

That the employee who feels it necessary to defend himself in an aggressive, offensive manner should be very mindful of the requirement placed on him, to prove conclusively that no other course of action remained open to him.

Occasionally, employees might be called upon to defend themselves from disturbed residents. This is a time when each employee must show maximum self-control and discipline to insure that he or she use only the least amount of force necessary in a given situation. An aggressive lashing out at a disturbed resident will, in most cases, only worsen the situation. When called upon to restrain a resident, in accordance with proper restraint procedures, the least amount of force necessary, applied intelligently, will insure that a resident's rights are not violated. Self-defense through action in violation of the definition of abuse outlined above will be excused only under the most unusual circumstances. Prudent self-defense that does not seek to cause harm to the resident will, inevitably, not only protect the employee from harm himself, but make it easier to control and calm the resident who is disturbed.

Date of Last Revision _____ Revision Number _____

Authorized by Executive Committee Date October 24, 1977

Approved by Superintendent R. Dimond Isenberg Ed.D.

Pennhurst Center Spring City, PA 19475	Category: Abuse of Resident Number: 207.5

Title: Employe Obligation Regarding Knowledge of Abuse

It is the policy of Pennhurst Center:

That all employes are required to immediately report an incident observed or of which they have knowledge that may be considered "abuse."

We have responsibility to protect the rights of the residents from others who may seek to violate those rights. This is a prime responsibility of us all, as many residents cannot or will not speak up for themselves. Simple human decency dictates that we do not allow our fellow employees to perpetrate actions upon the residents which we know are wrong. With cooperation from all employees at all levels, we will be able to guarantee the residents of Pennhurst the respect and dignity that is their right as our fellow human beings.

Date of Last Revision _____ Revision Number _____

Authorized by Executive Committee Date October 24, 1977

Approved by Superintendent C. Dennis Umbarger, Ed.D.

Pennhurst Center Spring City, PA 19475	Category: Abuse of Resident Number: 207.6

Title: Employer Obligation Regarding Abuse

It is the policy of Pennhurst Center:

That the employer has an obligation to see that the rights of both the resident and employe are protected by following established policies and procedures and carrying out actions in a fair and consistent manner without undue delay.

The employer also has an obligation to provide thorough training and opportunities for discussion to assure understanding of the policy by all employees.

Date of Last Revision _____ Revision Number _____

Authorized by Executive Committee Date October 24, 1977

Approved by Superintendent [signature]

APPENDIX C

Title 55—PUBLIC WELFARE

DEPARTMENT OF PUBLIC WELFARE

Use of Restraints and Patient Abuse

The Department of Public Welfare, by this order, adopts regulations relating to the use of restraints in treating patients/residents, as set forth in Annex A hereto, and relating to acts of abuse committed by institutional staff against patients/residents, as set forth in Annex B hereto.

These regulations were published for comment in 6 Pa. B. 3121 *et seq.*, on December 18, 1976.

Comments were received from a variety of groups and individuals, including institutional staff, advocacy groups for patients and residents, the Office of Administration, Bureau of Labor Relations, and the American Civil Liberties Union. The most extensive comments were submitted by staff at State schools and centers for the mentally retarded.

Extensive changes, both substantive and organizational, were made in response to the comments. Changes were suggested and made in three large areas, as follows:

1. The original regulations, published under the heading "Departmental policy on employe conduct in treating patients/residents," covered two distinct, if related, subjects: The use of restraints (§§ 8488.2-8488.6) and personnel rules relating to patient abuse (§§ 8488.1-2, 8488.6-8488.8). The two subjects were discussed together because the misuse of restraints becomes an act of abuse. Many persons felt intermingling of the two subjects was both confusing and inappropriate. The Department of Public Welfare (DPW) believes that the use of restraints and the nature of abuse must be seen and defined in relation to each other. That, indeed, is the lesson of McClelland v. Civil Service Commission, 14 Pa. Commonwealth Ct. 339, 332 A.2d 271 (1975). However, DPW recognizes that the regulations, as published, intermixed the issues in a confusing manner. Accordingly, the regulations have been divided into two separate parts: Section 8488 (as set forth in Annex A hereto) deals with the use of restraints; Section 8489 (as set forth in Annex B hereto) discusses personnel rules relating to patient abuse.

2. Many commentators state that the sections on restraints failed to distinguish between restraints used to control involuntary behavior or lack of muscular control and those used to control voluntary behavior. Commentators suggested that these restraints were so different in concept and application that it was in error to treat them together. The original regulations recognized this distinction implicitly, but did not fully make the distinction. These two types of restraints are now considered separately in §§ 8488.2 and 8488.3, with separate standards and procedures. DPW believes that this reorganization helps to clarify the issues involved.

3. Several groups focused on problems in the abuse sections. Two major criticisms were made: That the standard of proof before taking disciplinary action against employes was too stringent, and the penalties levied were too lax and too narrowly drawn. Numerous changes have been made in response to these suggestions.

a. Section 8488.7 had required a Superintendent to have proof of abuse beyond a reasonable doubt before suspending an employe and continuing an investigation. Now, suspension is initiated when an initial investigation produces evidence indicating that the employe committed the abuse.

b. Section 8488.7 had suggested an employe suspected of abuse could be "suspended" with pay. This has been changed, since it is inconsistent with Commonwealth labor policy. Superintendents may now suspend or permit remain on duty, either in-patient non-patient areas. If a suspension found to have been inappropriate, pay is available.

c. Section 8488.8, (relating categories of abuse) had include technical legal definition of "in abuse" and "serious abuse" forsaki the intent of the actor. This has been placed by a simpler "reasonable to lieve" standard.

d. Class Three Abuse, § 8488.8.2, resulted in a suspension of up of th days. This has been lengthened to days. Similarly, the sanction for a C Two Abuse, § 8488.8.3, formerly 3 days, is now 10-30 days.

e. The sanctions applicable to fail to report abuse and falsification of r ords relating to abuse are now allowed vary with the specific circumstanc DPW recognizes the seriousness of conduct, but believes that rigid class cation is not appropriate.

Numerous other changes have be made. Stylistic and minor organizatio changes have been made throughou The definition of abuse was clarifi The desirability of staff intervening po tively, in a therapeutic manner before situation requiring restraints develo is emphasized throughout. At the sa time, the ability to impose restrain bases upon predictions of hyperactiv is deleted. Treatment plans are now attempt to treat and control the behav leading to imposition of restraints. T definition of chemical restraints h been clarified to distinguish it from u use of drugs for purposes of treatmen Similarly, restraints are now distin guished from generalized securi measures in place in some DPW institu tions. Seclusion, as defined in the reg lations, may now not be used in S schools and centers, following Feder requirements.

The regulations hereby adopted a adopted pursuant to the authority co tained in the Public Welfare Code, act June 13, 1967 (P. L. 31, No. 21), §§ 30 341, 342, 351, 724, 901, and 902, amended (62 P. S. § 101 *et seq.*); th Mental Health and Mental Retardatio Act of 1966, act of October 20, 196 (P. L. 96, 3rd Sp. Sess. No. 6), §§ 201(2 201(8), and 202 (50 P. S. § 4101 *et seq.* and the Mental Health Procedures Ac act of July 9, 1976 (P. L. ____ No. 143 §§ 105, 112, and 113 (50 P. S. § 7109 *et seq.*).

The Department of Public Welfar finds:

(1) That public notice of intention t adopt the administrative regulation adopted by this order has been duly give pursuant to §§ 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) and the regu lations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) That the adoption of the regulations of the Department of Public Welfare in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

The Department of Public Welfare, acting pursuant to the authorizing statutes, orders:

(A) The regulations of the Department of Public Welfare relating to use of restraints and patient abuse are adopted to read as set forth in Annex A and Annex B to this order.

(B) The Secretary of the Department of Public Welfare shall submit this order and Annexes A and B hereto to the Department of Justice for approval as to legality, as required by law.

(C) The Secretary of the Department of Public Welfare shall duly certify this order and Annexes A and B hereto and deposit the same with the Legislative Reference Bureau, as required by law.

(D) This order shall take effect 30 days after publication in the *Pennsylvania Bulletin*.

By The Department of Public Welfare

FRANK S. BEAL,
Secretary of Public Welfare

Annex A

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3488. DEPARTMENTAL POLICY ON USE OF RESTRAINTS IN TREATING PATIENTS/RESIDENTS.

The following policy and procedures are applicable in all institutions operated by the Department, regardless of the type of facility, patient/resident composition, or services covered. Facilities covered include Youth Development Centers, Youth Forestry Camps, Restoration Centers, State general hospitals, and all State-operated institutions for the mentally ill or mentally retarded.

3488.1. Definition of Restraints.

Restraints include any and all devices and techniques designed and used to control acute or episodic aggressive behavior or involuntary movement of patients/residents. Restraints do not include general protective security measures adopted in various institutions, including locked wards; special security measures adopted in Youth Development Centers (YDC's) and Youth Forestry Camps (YFC's), maximum security State hospital or forensic units in State mental hospitals; or specific security measures ordered by a court. Restraints can be classified according to the method used to control behavior as:

(1) Mechanical restraints.

(2) Chemical restraints.

(3) Seclusion.

(4) Exclusion.

(5) Psychological restraints.

Restraints may also be classified based on whether they are designed to control:

(1) Involuntary movement or lack of muscular control due to organic causes or conditions; or

(2) Acute or episodic aggressive behavior.

The intent with which restraints are used distinguishes these two categories. Procedures for employing restraints, as defined in §§ 3488.2 and 3488.3 depend upon whether acute or episodic aggressive behavior or involuntary action is controlled.

§ 3488.1-1. General Policy Regarding Use of Restraints.

Restraints shall be employed only when necessary to protect the patient/resident from injuring himself/herself or others, or to promote normal body positioning and physical functioning.

Restraints shall not be employed as punishment, for the convenience of staff, as a substitute for program, or in any way that interferes with the treatment program. Restraints shall not be applied unless all other available techniques or resources have failed, and the least possible restrictions shall be used.

Individual program plans, developed for patients/residents in accordance with applicable statutes and regulations, shall have goals and methods aimed at treating and eliminating behavior necessitating the use of restraints. Efforts shall similarly be made by employes to reduce the need for restraints by utilizing therapeutic approaches such as goal planning aimed at redirecting and releasing aggression through healthy channels, counseling, and withdrawing a patient/resident from an overstimulating environment.

The Superintendent/Director is administratively responsible for insuring that restraints are imposed only in accordance with these regulations. The Superintendent/Director is responsible for insuring that employes shall know specific procedures, methods and steps to follow in instituting these regulations and that they are familiar with regulations and the criteria for the application.

Each institution must prepare restraint plan describing specific drugs for use by employes in implementing these regulations. The must be submitted through the appropriate Regional Deputy Secretary Regional Program Commissioner approval by the Executive Deputy Secretary and appropriate program Deputy Secretary. Each plan shall specifically describe a restraint training program including refresher courses to be offered all employes working with patients/residents. The plan must also include a procedure for monitoring the implementation and application of these regulations. A specific individual or committee must be designated for this purpose.

§ 3488.2. Use of Restraints to Control Involuntary Movement Due to Organic Causes or Conditions.

A. Mechanical restraints control involuntary movement or lack of muscular control of patients/residents due to organic causes or conditions, to be employed only as part of an individual program plan, upon a finding by a member of the program team trained in the use of such restraints, that a particular restraint is necessary:

1. To prevent a patient/resident from injuring himself/herself and others.

2. To promote normative body positioning and physical functioning.

The least restrictive restraints adequate to meet these goals shall be used. These restraints shall be applied in accordance with principles of good body alignment, concern for circulation, and allowance for changes of position or exercise on a regular basis.

B. The initial need for such restraints must be reviewed and approved by the individual or committee not directly involved in treatment of that patient/resident. The continued need for the restraint shall be reviewed as part of the review of individual program plans required by applicable statute and regulations.

C. Mechanical restraints authorized by the program plan shall be employed only as actually necessary to meet the standards and goals stated above.

D. In emergency situations, restraints not part of an individual program plan may be used in accordance with the procedures and standards of § 3488.3 relating to restraints upon acute or episodic aggressive behavior.

Examples: Mechanical restraints which may be made part of the Individual Program Plan include but are not limited to protective helmets, supportive body bands, posey belts, wheelchair vests, bed rails, and similar protective devices and body position devices, which

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ished to prevent danger to the patient/resident or others from his/her involuntary actions.

§ 3488.2.1. Use of Restraints to Control Acute or Episodic Aggressive Behavior.

§ 3488.2.1. General Policy.

Restraints designed to control acute or episodic aggressive behavior of patients/residents shall be employed only in accordance with the procedures and standards set forth below. Individual Program plans shall attempt to treat the behavior necessitating the use of restraints. Employes should attempt to prevent such behavior by recognizing indications of impending behavior and intervening in a positive, constructive manner to prevent hyperactivity or assaultiveness.

§ 3488.2.2. Standards.

Restraints shall be used to control acute or episodic aggressive behavior when a patient/resident is acting in such a manner as to be a clear and present danger to himself/herself, to other patients/residents, or to employes, and only when less restrictive measures and techniques have proven to be or are less effective.

The use of restraints, the conduct necessitating the restraint, and alternative methods which were unsuccessful in controlling the behavior shall be noted in the patient's/resident's chart. The monitoring of patients/residents under restraint shall be recorded in the chart.

§ 3488.2.2. Mechanical Restraints.

§ 3488.2.2(A). Definition.

Mechanical restraints used to control acute or episodic aggressive behavior include anklets, wristlets, camisoles, muffs, mitts with lock buckles, wrist straps, head straps, restraining sheets, and other similar devices.

§ 3488.2.2(B). Procedures.

Qualified mental health professional staff designated by the Superintendent/Director may order use of mechanical restraints for a period not to exceed two hours. A physician shall be promptly notified. This initial order may not be renewed or extended by anyone before a physician examines the patient prior to doing so.

A patient's/resident's treatment plan should indicate to the extent possible which physical restraints may and may not be utilized in an emergency and should call attention to possible physical problems which should be monitored. A patient/resident who is subject to mechanical restraints should be checked at least every 15 minutes by staff. Physical needs must be met promptly.

Opportunity for movement or exercise shall be provided for a period of not less than 10 minutes during every two (2) hours in which such restraints are employed.

The patient's/resident's chart shall document that these procedures have been followed.

§ 3488.2.4. Chemical Restraints.

§ 3488.2.4(A). Definition.

Chemical restraint shall mean the use of drugs or chemicals for the specific and exclusive purpose of controlling acute or episodic aggressive behavior by a patient/resident. Drugs administered on a regular basis, as part of the treatment plan and for the purposes of treating the symptoms of mental, emotional, or behavioral disorders and for assisting the patient/resident in gaining self control over his/her impulses, are not to be considered chemical restraints.

§ 3488.2.4(B). Procedures.

No chemical restraints shall be administered except upon the order of the physician.

A telephone order may be accepted for medication intended for use as a chemical restraint in an emergency situation only. A physician must examine the patient/resident within one hour of the telephone order with due attention being paid to prior mental and physical status and his/her history. Until a physician arrives, appropriate staff shall monitor the patient's/resident's physical well being.

In a non-emergency situation, a physician must examine the patient/resident prior to ordering medication as a chemical restraint with due attention being paid to the patient's/resident's prior mental and physical status and his/her history before any such drugs are administered. Medication shall be administered at intervals and dosages whereby adequate attention can be rendered to the patient's/resident's mental, physical and motor responses and vital signs.

Once the level of medication appropriate to the circumstances has been determined, the patient's/resident's vital signs must be monitored at appropriate intervals, and the patient/resident followed and seen by a physician at periods appropriate to the circumstances, but at least every 12 hours. For mental health facilities monitoring of vital signs shall be conducted at least once in every 30 minute period.

Proper documentation relating to the effect of the medication must be recorded by appropriate personnel.

The Superintendent/Director or his or her designee is responsible for monitoring all medications administered to a patient/resident for the purpose of chemical restraint.

§ 3488.2.5. Seclusion.

§ 3488.2.5(A). Definition.

Seclusion is the placement of a patient/resident in a locked room and may be used as a therapeutic technique only, and only under the following conditions:

1. When necessary to protect the patient/resident or others from physical injury.

2. To decrease the level of stimuli when a patient/resident is in a state of hyperactivity, and

3. Only when less restrictive measures and techniques have proven ineffective.

The patient's/resident's request to spend time in a private (unlocked) room is not to be considered seclusion and should be granted if feasible and therapeutically contra-indicated. Quarantine or other preventive health measures are not considered seclusion.

Seclusion as defined above shall not be employed in state centers for the mentally retarded.

Within MR and MH facilities, exclusion, consisting of removing the resident from his/her immediate environment and restricting him/her to another area may be used. Exclusion, for the purpose of protecting the resident or others, shall only be employed when it is clearly documented that other, less restrictive methods have been unsuccessful in controlling the unacceptable behavior. Exclusion must be time limited and documented as a therapeutic technique in the resident's individual treatment plan.

In mental health facilities children under the age of 14 requiring seclusion or exclusion shall be continuously monitored within or just outside the seclusion area by mental health personnel, and the room shall not be locked or otherwise secured. Soft inanimate objects shall be made available to the patient to prevent the venting of aggression.

§ 3488.2.2(B). Procedures for Institutional Seclusion or Exclusion.

In mental health facilities if a patient voluntary treatment requires seclusion will not consent to such and requests to be discharged, this request shall be granted unless the procedures and standards of § 302 of the Mental Health Procedures Act of 1976 regarding emergency involuntary treatment (§ 7100.2.6.1(D) of the Act 143 Regulations are followed. Similarly, the procedures of § 403 of the 1966 Mental Health and Mental Retardation Act must be followed for mentally retarded persons who have been voluntarily admitted, request seclusion, and request to be discharged.

In the case of Mental Health facilities authority for seclusion of a patient/resident rests with the Director or his designee. In Mental Retardation facilities, authority for exclusion rests with the qualified mental retardation professional. In the case of Youth Development Centers, Youth Forestry Camps and all other DPW institutions authority for seclusion rests with the Superintendent/Assistant Superintendent. Normally, written orders must precede placement of a patient/resident in seclusion or exclusion. In emergencies, telephone orders may be accepted, but written order must be properly countersigned within the time specified by the insti-

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n. In no case, however, should this
riod exceed 24 hours.
An order for seclusion or exclusion is
id for only 24 hours. The time the
der is received will be recorded with
e order on the order sheet.
In Mental Health/Mental Retardation
cilities, telephone orders are not ac-
ptable for continued seclusion or ex-
sion. The patient/resident must be
en by a physician within 24 hours, and
e order must be rewritten and sup-
rted by a progress note. In Youth
evelopment Centers and Youth Fores-
y Camps, the resident/patient must be
en by the Superintendent/Assistant
perintendent who will assess the resi-
nt's/patient's needs and seek profes-
nal consultation if indicated.
In the absence of a written or tele-
one order, a patient/resident may be
aced in seclusion or exclusion as a pro-
ective measure for no more than one
ur when such action is immediately
ecessary.
If a patient/resident is placed in seclu-
on or exclusion as an emergency pro-
dure, the unit program supervisor or
propriate designated program spe-
alist of the area must be notified
mediately.
In Mental Health/Mental Retardation
cilities, if the nursing supervisor, des-
nated program specialist, after visit-
g the patient/resident, deems seclusion
exclusion necessary, the attending
ysician or his/her delegate must be
tified immediately. In Youth Devel-
ment Center or Youth Forestry Camp
cilities, if the designated program spe-
alist, after visiting the patient/resi-
ent, deems seclusion necessary, the
uperintendent/Assistant Superinten-
ent must be notified immediately.
In all facilities, the nursing supervisor
designated program specialist will
cument his/her observations fully on
appropriate progress report.
The following procedure is to be fol-
wed when a patient/resident is in
clusion:

1. Potentially dangerous articles will
e removed from the patient/resident.
his includes articles of clothing if there
re reasonable grounds to believe such
othing constitutes a substantial threat
the health or safety of the patient/resi-
nt or others.

2. The patient/resident will be
ecked at no less than 15-minute inter-
ls by personnel.

3. The physical needs of the pa-
nt/resident will be given prompt
sponse.

4. Concise and informative written
ports concerning the status of the pa-
nt/resident will be prepared and re-
ined in the record of the patient/resi-
nt in seclusion or exclusion. Daily
ritten reports concerning patient/resi-
nts in seclusion or exclusion shall be
epared and sent to appropriate desig-
nated staff of the facility. These reports shall include information as follows:

a. Identifying data concerning name, age, location in building and record number of patient/resident.

b. Reason for seclusion or exclusion.

c. Period of time in seclusion or exclusion.

d. Brief statement regarding status of patient/resident.

e. Record of time given for attention to personal needs.

§ 3488.2.6. Psychological Restraints.

Psychological restraints include those therapeutic regimes or programs which involve the withholding of privileges and participation in activities.

Psychological restraints shall not affect the right of a patient/resident to basic sustenance, clothing or shelter, or communication with appropriate and responsible persons — such as family members, attorneys, physicians, qualified program specialists, or clergymen.

In all cases, psychological restraints must be in the nature of restrictions that are therapeutically based, clinically justified, and made part of the treatment plan.

Annex B

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§ 3489. PERSONNEL RULES AND INSTITUTIONAL POLICY ON ACTS OF ABUSE AGAINST PATIENTS/RESIDENTS.

The following policy is applicable in all institutions operated by the Department, regardless of the type of facility, patient/resident composition, or services provided. Facilities covered include Youth Development Centers, Youth Forestry Camps, Restoration Centers, State general hospitals and all State-operated institutions for the mentally ill and mentally retarded. In those institutions serving children covered by the Child Protective Service Act, act of November 26, 1975 (P. L. , No. 124) the facility must also comply with the departmental reporting procedures applicable to this Act. Also the procedures of § 5560, DPW Manual, relating to reporting and investigation of deaths and unusual incidents must be complied with. Nothing herein shall be construed to limit or affect an employes existi appeal rights under Civil Service law collective bargaining agreements.

§ 3489.1. Basic Policy.

It is inherent in the nature and digni of each individual that he/she be accord certain human rights. The presence of handicap in no way lessens these righ Employes of the Department are du bound to recognize the rights of all p tients/residents who have been en trusted to the Department for care an treatment. All employes are subject to continuing obligation to deal with eac patient/resident in the most human manner possible.

No employe may at any time commi an act of physical or emotional abus against any patient/resident, inmate, trainee in any institution under the d rect ownership and operation of the D partment of Public Welfare. Violation this standard will subject employes disciplinary action, including possibl dismissal.

§ 3489.2. Employe's Obligations.

All employes have a primary duty to r spect the rights of all patients/resident to treat them with dignity and to preven others from violating their rights as wel Any employe witnessing or having knowledge of an act of abuse to a pa tient/resident is obligated to report it an appropriate individual designated b the Superintendent/Director. Failure do so will be considered a serious violation of an employe's responsibility con cerning the care of patients/residen and may subject the employe to disc plinary action.

The disciplinary action to be taken i situations involving the falsification records relating to an act of abuse or th reporting of it will depend upon the spe cific circumstances involved. Simila the disciplinary action to be take against employes who have reported incident of patient/resident abuse an later refuse to testify with respect to th incident, as well as employes who refu to answer reasonable questions regard ing his/her duties as they relate to pa tient care will depend upon the specif circumstances involved.

Each employe has an obligation to b familiar with this policy and to adhere these regulations. With cooperation fro all employes at all levels, it is possible guarantee the patients/residents the r spect and dignity that are their right fellow human beings.

§ 3489.2.1. Department's Obligations.

The Department has an obligation see that the rights of both the patient/r sident and the employe are protected b following established policies and proc dures and by carrying out personnel a tions in a fair and consistent manne without undue delay.

The Department also has an obligation, through training and opportuni for discussion, to assure understandi

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of regulations-policies by all employes. Also, the Department recognizes its responsibility to provide employes with training to prevent or allay situations which would result in more restrictive measures for the patient/resident without easy intervention or redirection.

It is the responsibility of the Superintendent/Director to notify immediately an employe charged with abuse of the nature of the alleged abuse, when and where it is alleged to have occurred, and the name of the patient/resident alleged to have been abused, and to follow the procedures of § 3489.4 below.

§ 3489.2. General Policy and Guidelines Concerning Patient Abuse.

The following conditions and guidelines are applicable to the overall policy on patient abuse.

§ 3489.2.1. Definition of Abuse.

An abusive act is any act or omission which may cause or causes actual physical or emotional harm or injury to a patient/resident, or any act which willfully deprives a patient/resident of his/her rights as defined by the Department of Public Welfare rules and regulations.

Act of abuse directed against patients/residents are absolutely prohibited. Such acts are cause for disciplinary action including dismissal, and possible criminal prosecution.

Questions may arise as to what actions constitute abuse of a patient/resident. Any action which may cause or causes actual physical or emotional harm or injury, which is not caused by simple negligence, constitutes abuse. Actions such as striking or kicking a patient/resident, restraining a patient/resident improperly or without authorization, and other such actions which can be seen as causing physical pain to a patient/resident are strictly forbidden. Acts such as teasing, humiliating, degrading or intentionally ignoring a patient/resident, may constitute abuse and will be dealt with no less severely than acts causing physical injury.

Non-action which results in emotional/physical injury is viewed in the same manner as that caused by improper or excessive action. All actions in which employes engage with patients/residents must have as their legitimate goal, the healthful, proper and humane care and treatment of the patient/resident.

§ 3489.2.2. Patient/Resident Discipline.

This policy in no way prohibits the concept of discipline, thoughtfully and properly applied for patients/residents. Approved forms of discipline described, planned and documented in the treatment programs, such as those outlined in therapy programs and behavior shaping programs, are not considered abuse. Self-discipline is a necessary skill that all people must learn, and is one which responsible employes cannot ignore.

§ 3489.2.3. Restraint and Self-Defense.

Occasionally, employes may be called upon to defend themselves or others from patients/residents. This is a time when each employe must show maximum self-control and self-discipline to insure that he/she uses only the minimum amount of force necessary in a given situation.

When an employe is called upon to restrain a patient/resident in accordance with proper restraint procedures, the least amount of force necessary, applied intelligently, will not only insure that a patient's/resident's rights are not violated but, more appropriately, assist that patient/resident in regaining self-control.

Employes should attempt to prevent patient/resident behavior leading to a situation in which restraints or other physical action will be necessary by recognizing indications of impending hyperactivity or assaultiveness and intervening in a positive, constructive manner. Examples are involving the patient/resident in other activities, removing the source of over-stimulation, giving the patient/resident a chance to get away or to relax, etc. These actions and all actions of self-defense must be undertaken with maximum self-control and discipline, and should involve the least force necessary.

Prudent self-defense that does not seek to cause harm to the patient/resident will, inevitably, not only protect the employe from harm, but will make it easier to control and calm the patient/resident who is disturbed.

In any situation the employe who feels the necessity of defending himself/herself in an assertive, forceful manner should be very mindful of the requirement placed on him/her to be able to demonstrate that alternative action was not reasonably available and that the minimum amount of force necessary was used.

§ 3489.4. Investigation of Abuse.

The Superintendent/Director is responsible to receive and investigate reports of abuse, but may designate a person or persons to receive and investigate such reports. When abuse is reported, the following procedures should be followed:

1. The Superintendent/Director or his/her designee interviews and secures information in writing concerning the reported incident from the reporting party and the involved patient/resident where possible, and other possible witnesses. The employe involved must be interviewed and a signed written statement about the incident secured from him/her. An employe may be accompanied by a representative during the interview. Any employe suspected of abuse or believed to be a witness to any act of abuse who refuses to answer reasonable questions may, on that basis, be subject to disciplinary action.

2. If the circumstances of the alleged abuse are satisfactorily explained by the employe to the facility director, the investigation is terminated. The employe record should not contain any record the alleged incident or investigation.

3. If the initial investigation produces evidence indicating that an employe committed or contributed to the alleged abuse, the investigation is continued. During the period of investigation, the employe is, depending on the nature the offense and circumstances:

a. Permitted to remain on duty patient care areas;

b. Permitted to remain on duty, but assigned to non-patient related duties, available, as determined by instruction management; or

c. Suspended pending investigation.

4. Suspension shall be ordered if evidence indicates that the employe committed a Class One or Class Two category of abuse and may be ordered in certain instances of Class Three Abuse. Dismissal may be ordered if evidence indicates the employe committed a Class One category of abuse. The employe will be notified orally as soon as possible, and in writing as soon as possible, regarding suspension or dismissal. This action must be reported immediately to the DPW. Labor Relations Division, Harrisburg.

5. A more thorough investigation conducted within a time consistent with various Departmental policies and regulations, but no later than 30 days after the initial reporting of the incident abuse. This investigation may include additional interviews with the involved employe, other staff, and patients/residents. If the investigation indicates the possibility of criminal action, the Superintendent/Director is to notify immediately the appropriate Regional Commissioner who is to notify the Office of Legal Counsel and the Labor Relations Division. Upon approval of the Regional Commissioner, the Superintendent/Director shall notify police.

6. After the investigation, the Superintendent/Director determines within a time consistent with Department regulations whether an incident of abuse has taken place and takes appropriate personnel action.

7. In those institutions serving children covered by the Child Protective Service Act, act of November 20, 19[illegible] (P. L. 438, No. 124), the facility must also comply with the Departmental reporting procedures applicable to this Act.

§ 3489.5. Discipline Guide.

The following Discipline Guide is to be implemented as part of the policy to be followed after investigation of suspected cases of patient abuse. The guide basically sets up three levels of abuse: Class One — calling for dismissal;

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Class Two — calling for suspension; and
) Class Three — calling for either a let- of reprimand or a suspension. As ted above, failure to report abuse and nfinement or records relating to abuse ay fall into one or another of these tegories depending upon the circum- nces. The guide cannot cover all inci- nts and types of abuse and is not in- ded to do so. It does, however, serve a guide in the handling of all acts of use.

§ 3489.5.1. Categories of Abuse.

Minor Abuse: Any act or omission hich may cause or causes non-serious motional or physical harm or injury to e patient/resident, where it is reason- le to believe that harm or injury would sult.

Serious Abuse: Any action or omission hich may cause or causes serious emo- nal or physical harm or injury, where is reasonable to believe that harm or jury would result.

Negligent Abuse: Any act or omission hich causes emotional or physical in- ry to the patient/resident, done relessly and unintentionally, and hich falls markedly below the reason- le standards of conduct expected of nployes in performing their jobs.

Violation of Department Regulations: ny act intentionally done, which vio- tes regulations relating either to pa- nt's/resident's rights or to his/her care, here failure to so observe the regula- on may lead to the patient/resident re- iving emotional or physical injury or arm.

§ 3489.5.2. Class Three Abuse.

Any employe found, for the first time, have committed any act of abuse fal- ng within the following categories shall disciplined by a letter of reprimand for e first offense and either by a suspen- on of not more than ten days or by letter reprimand for the second offense thin a 12-month period.

a. Minor abuse.

b. Negligent abuse.

§ 3489.5.3. Class Two Abuse.

Any employe found to have committed y act of abuse falling within the fol- wing categories shall be disciplined by suspension ranging from ten to 30 days r each act of abuse found to have been mmitted. No employe shall be sus- nded for more than an aggregate of 30 ys per calendar year.

a. Minor abuse, when the actions ken are the product of prior planning.

b. Violation of Department regulations.

c. Minor abuse when the employe has within the past three years been found to have committed two acts of Class Three abuse.

§ 3489.5.4. Class One Abuse.

Any employe found to have committed ny act of abuse falling within the fol- lowing categories shall be disciplined by immediate dismissal.

a. Serious abuse.

b. Pattern of minor abuse.

c. Any Class Two abuse, when the em- ployee has within the past 12 months been found to have committed the same category of abuse.

§ 3489.6. Implementation of Employe Discipline.

1. If the Superintendent/Director finds after investigation that the employe has committed an act of Class One abuse, the employe is dismissed.

2. If the Superintendent/Director finds after investigation that the employe has committed an act of abuse of the Second Class or in certain circumstances of the Third Class, the employe is either:

a. Reinstated, if he/she has been suspended for a time longer than the offense warrants, and paid for the suspension time beyond the warranted suspension; or

b. Kept on suspension for the duration of the time warranted by the offenses. Suspension time is counted from the time when the suspension is initiated.

3. If the Superintendent/Director finds that the employe is guilty of abuse of the Third Class (see § 3489.5.2) not warranting suspension, a letter of reprimand is sent to the employe.

4. If the employe is exonerated, he/she shall be reinstated without prejudice and be paid for the time he/she was suspended. The employe's record shall contain no report of the employe's alleged involvement in an abuse situation.

[Pa.B. Doc. No. 77-1978. Filed October 28, 1977, 9:00 a.m.]

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APPENDIX D

ACTION CHECK FORM — DRAFT

This form is to be used to report incidents of suspected neglect, se, improper restraint, seclusion, poor medical treatment, wheel- r problems, improper feeding, program denial, or unsanitary living itions.

Complete it and send it to George Kopchick, Superintendent, and Brody, Special Assistant, who will investigate your complaint nin 48 hours.

Telephone Mr. Kopchick at x 201 for any situation that immediately angers a client and which is beyond your ability to correct.

---

e_____ Client Name_____ Living Area_____

T I SAW:

nesses: Name & Classif.

Reported by: Name & Classification

Pennhurst Phone # _____

---

be followed up by_____ Date Assigned_____

Special Instructions:_____

igned by_____

plaint #_____

Follow - Up DRAFT

This form is to be completed within 48 hours after a HELP REQUESTED form is received. It is to be returned to George Kopchick, Superintendent, and Jim Brody, Special Assistant.

Complaint # _____ Relevant Court Order # _____

Investigator _____ Deadline _____

STEPS TAKEN TO INVESTIGATE DATE

INDINGS:

agree that Pennhurst is in probable violation of the Court Order

UGGESTED CORRECTIVE STEPS RESPONSIBLE PERSON TARGET DATE

---

ate this FOLLOW-UP received _____

UPERINTENDENT'S RESPONSE/ACTIONS TO BE TAKEN:

Verification DRAFT

ELP REQUESTED #_____

ATE OF RE,UE.T_____

ATE FOLLOW-UP RECEIVED _____

: N Problem has been resolved / date

: N Problem still exists.

Comments:

Corrective Steps Suggested:

erifioation sent to & date

---

perintendent's Comments:

APPENDIX E: PLACEMENT PROCEDURES FOR PROVIDING PENNHURST CLASS MEMBERS WITH MINIMALLY ADEQUATE HABILITATION IN THE LEAST RESTRICTIVE ENVIRONMENT ("PLACEMENT PROCEDURES")

These procedures are intended to replace the Guidelines for Case Managers written by the Office of the Special master in November, 1979 and revised in August, 1980. The procedures are consistent with the requirements of the Court's Orders.

The "approval authority", as that term is used herein, shall be the Special Management Unit of the Office of Mental Retardation.

The "Individual Habilitation Plan (IHP)" is a written plan which states an individual's strengths and needs along with the services and methods necessary to develop further the strengths and meet the needs so that the retarded person is able to achieve his/her maximum development. The IHP presents a comprehensive picture of an individual, identifies goals and objectives and outlines the manner in which the retarded class member is to receive minimally adequate habilitation in the least restrictive environment in accordance with the Court's Orders. The Transitional Individual Habilitation Plan (TIHP) is the initial IHP developed to facilitate an individual's transfer to the prospective residential placement.

A "planning and assessment team", consisting of the retarded individual, his parent/guardian and certified advocate, together with the professionals providing the services, decide, as a team, on the provisions of the IHP. The composition of the team depends on the needs of the individual, and includes, but is not limited to, the individual, his/her parent or guardian, and certified advocate, the case manager and providers responsible for the services to be delivered to the individual.

EACH COUNTY ADMINISTRATOR SHALL MAKE CERTAIN THAT THE FOLLOWING OCCURS:

PRIOR TO DAY 1

i) Case Manager shall meet the individual, his parent/guardian and certified advocate and discuss the complete placement process with them, including all rights and responsibilities.

ii) Send notice to person to be placed and parent/guardian[1] and advocate that they have the opportunity for full participation in the development of the IHP for community services.

iii) In the absence of a parent/guardian or at the request of the retarded person or his or her parent/guardian, the case manager shall request a certified advocate.

iv) Complete an Adaptive Behavior Scale (A.B.S.) or Behavior Development Scale (B.D.S.).

v) Complete and submit to the approval authority and county CLA coordinator an Individual Skill Summary (see Appendix 1).

vi) County CLA Coordinator shall distribute "Proposal Requests" which require providers to specify how they will meet the needs of the person to be placed.

DAY 1

1. Case manager shall conduct the initial team meeting (see Appendix 2).

   A. Include: The person to be placed, parent/guardian, advocate, current facility social worker, the residential and day program providers (when identified), and others who may provide relevant programmatic information. (Consider requests of any team member for other persons to be included on the team).

   B. Provide notice of all team meetings to all team members, and continue to send notices of future meetings to any team member who fails to participate.

   C. Proceed with meetings even if any member fails or refuses to participate after they have received notice.

   D. Review Individual Skills Summary and assessment materials.

   E. Develop plans for pre-placement visits to proposed community programs, site requirements (adaptations, etc.), staffing, health and safety precautions (see Appendix 3).

---

1. The term "parent/guardian", as defined in Paragraph 2 of this Court's Order, includes, in the parent/guardian's absence or at their request, the closest other relative, provided such relative has demonstrated an active interest by visits or contact with the person.

2. Submit to the approval authority a summary of the initial team meetings (share copies with all team members).

BY DAY 65

3. CLA Coordinator shall involve the case manager (TIHP Team Leader) in the review of the residential sites which must be appropriate to the needs of the person to be placed.

BY DAY 75

4. Residential site obtained. Case manager shall concur in writing (in the client file) that site is appropriate for the person's IHP.

BY DAY 90

5. Residential staff hired, report for duty and begin training.

BY DAY 105

6. Renovations, furnishing and decoration of residence completed.

7. Transitional visits begin (meal, day, overnight).

8. Make arrangements for transfer of records to facilitate SSI and MA applications.

BY DAY 120

9. Residential staff training completed.

10. Draft the transitional IHP (see Appendix 6).

11. Case manager shall conduct the Transitional Individual Habilitation Plan meeting:

    A. Develop a TIHP for habilitation in an appropriate residence in accordance with the Court's Orders, including plans for all supportive services and emergency medical and respite care.

    B. Concur that the plan meets the person's needs with respect to restrictiveness.

    C. Plan services which shall provide the class member with minimally adequate habilitation in the least restrictive environment in accordance with the Court's Orders.

    D. Plan services, consistent with the developmental model, which afford the retarded person with a reasonable opportunity to acquire and maintain such life skills as are necessary to enable him or her to cope as effectively as their capabilities permit.

BY DAY 155

12. Submit written plan to and obtain signatures of the person, parent/guardian and/or advocate, residential and day program providers indicating agreement/disagreement with the TIHP. Explain the mediation, individual determination, and placement processes.

13. When members disagree with the provisions of the TIHP, submit TIHP and a signed "TIHP Agree/Disagree" form to the approval authority, initiating mediation for resolution.

14. When all members agree with the provisions of the TIHP, submit TIHP with the signed "TIHP Agree/Disagree" form to the approval authority for their assurance statement.[2] Revise the TIHP when the approval authority requires change(s) for their assurance.

BY DAY 175

15. The approval authority reviews the plan.[3]

BY DAY 185

16. The approval authority responds to the plan.

BY DAY 190

17. Send Form Letter I (see Appendix 4) to the person to be placed, parent/guardian, and/or advocate.

    A. Send copies to the Hearing Master and approval authority(s).

    B. Attach the TIHP and hearing procedures to the notice.

    C. Attach Form Letter II (see Appendix 5) to Form Letter I.

    D. Deliver notices in person or by certified mail, return receipt requested.[4]

IF HEARING CONVENED

18. In the event the Hearing Master determines that the transfer is beneficial, proceed with the arrangements to transfer the resident to the residence.

19. In the event the Hearing Master determines that the transfer is not beneficial, proceed in accordance with paragraphs 38-40 of this Order.

ON AN ON-GOING BASIS

20. Monitor and document the status of each person placed.

    A. Observe the person at the residential program once per month.

    B. Observe the person in day program once every six weeks.

    C. Contact provider agencies at least once per month.

---

2. Assurance statement says that the proposed community living facility and other community services will provide the class member with minimally adequate habilitation in the least restrictive environment in accordance with the Court's Orders.

3. TIHP's submitted more than 45 days after the meeting date will be returned to be updated.

4. Mailing to parent/guardian and certified advocate is to be sent both regular and certified mail, return receipt requested.

D. Attend all program planning meetings for the person placed.

E. Ensure referrals and coordinate the arrangement for necessary supportive services.

F. Ensure that written monthly progress report is received from residential, day and other providers.

G. Attend all announced monitorings by the approval authority or its agents.

21. Maintain on-going contact with parent/guardian, and/or advocate.

WITHIN FOUR MONTHS AFTER PLACEMENT

22. Schedule an IHP meeting.

A. Include person, parent/guardian, and/or advocate, residential provider, day provider, community therapy providers/core team directors.

B. Provide notice of meeting(s) to all team members.

BY FOUR MONTHS

23. Case managerwill conduct Individual Habilitation Plan meeting (see Appendix 6).

A. Include plans for medical, emergency, and respite care.

B. Concur that the plan provides a less restrictive program.

C. Plan services which shall provide the Pennhurst class member with minimally adequate habilitation in the least restrictive environment, in accordance with this Court's Orders.

D. Plan services, consistent with the developmental model, which shall afford the retarded person a reasonable opportunity to acquire and maintain such life skills as are necessary to enable him or her to cope as effectively as other capabilities permit.

24. Obtain signatures of person, parent/guardian, certified advocate, residential provider and day program provider, indicating agreement or disagreement.

WITHIN THIRTY DAYS AFTER THE IHP MEETING

25. Submit IHP and a signed "Agree/Disagree" form to a designated County Official for review of compliance with the Court Orders, appropriateness and completeness of the plan. When team members disagree with plan, request County Administrator to initiate mediation for resolution. Following Review/Approval the plan will be forwarded to the approval authority for reference, comment and monitoring.

EVERY SIX MONTHS

26. Initiate review and up-date of IHP as expressed in a memorandum or addendum detailing all changes in the person and their program. Following County Review/Approval submit to the approval authority.

EVERY YEAR

27. Conduct an IHP meeting and submit plan with all agree/disagree forms to a designated County official for Review/Approval. Following Review/Approval submit to the approval authority.

AS NEEDED

28. When person placed is not progressing in accordance with the plan, initiate review of IHP and program. Following County Review/Approval submit to the approval authority.

29. When individual circumstances change, as in planned or emergency relocation, initiate review of the IHP and program. Following County Review/Approval submit to the approval authority.

CHANGES IN SERVICE LOCATIONS (see Appendix 7)

30. PLANNED RELOCATION: A planned relocation is any change in the location of a person's residence and/or day program based on supportive data which indicates that such a change is in the best interests of the person and is consistent with this Court's Orders.

A. RESIDENTIAL: For each planned residential relocation:

1) Follow county responsibilities described in Appendix 7 on requested relocation.

2) Submit to regional office and approval authority a written notice of relocation.

3) Submit a new "Pre-Placement Activities" page, reflecting the rationale for the proposed change and any other information that may be requested by the approval authority.

B. DAY PROGRAM: For each planned day program relocation:

1) Submit to regional office and approval authority a written notice of relocation.

2) Submit to approval authority a revised educational/vocational skills section of the IHP.

3) Submit a new "Pre-Placement Activities" page, reflecting the rationale for the proposed change and any other information that may be requested by the approval authority.

31. EMERGENCY RELOCATION: Emergency relocation is any change in the location of a person's residential/day program necessitated by a situation which would place the person or others in danger of serious physical or psychological harm and requires action within less than 10 calendar days.

A. WITHIN 24 HOURS:

1) Notify parent/guardian and certified advocate.

2) Notify approval authority via telephone.

B. WITHIN 72 HOURS AFTER RELOCATION: Submit to the Regional Office and approval authority a report of circumstance necessitating relocation and a statement of services required during emeregency relocation.

INDIVIDUAL SKILL SUMMARY

(To be completed following completion of steps i. - v. of Placement Procedures)

PERSON

DATE OF BIRTH

PRESENT ADDRESS

PERSON'S STRENGTHS AND PRESENT SKILLS	PERSON'S PROGRAMMING NEEDS	SOURCE OF INFORMATION	ANTICIPATED SERVICES	ADDITIONAL EVALUATIONS NEED YES/NO AND LIST

APPENDIX 1

SUMMARY OF INITIAL TEAM MEETING

PERSON	MEETING DATE
CASE MANAGER	COUNTY

INCLUDE THE FOLLOWING INFORMATION IN THIS SUMMARY:

- Persons in attendance
- Questions raised, information given, conclusions reached
- Assessments/evaluations to be completed:
  - Include persons responsible and time frames
- Definition of site(s) and adaptations
- Schedule of pre-placement visits*
- Schedule of provider visits with person*
- Date of next meeting*
- Date of TIHP meeting*

R E M I N D E R: Summary of Initial Team Meeting shall be distributed to all team members and the Approval Authority within two (2) weeks after Initial Team Meeting.

*If information is not known at the conclusion of the meeting, it shall be provided to all parties by the case manager when known.

APPENDIX 2

COMPONENTS OF PRE-PLACEMENT VISITS

Definitions: Any time-limited on-site visit(s) to the proposed community residential and/or day program prior to the actual move to same program.

Purpose:

1. To gather information necessary to the development of an appropriate TIHP.
   a. Opportunity to observe person's demonstration of skills in a different environment.
   b. Opportunity to assess/baseline behavior and learning skills.
2. To acquaint the person with the proposed residence, day program, staff, housemates, co-workers and the community.

Who: Any person for whom community placement planning has begun or for whom a change in community residential or day program has been proposed.

When: Any time after the Initial Team Meeting and until actual community placement (this does not limit the amount or type of visits/contacts by provider agencies with the person at his/her current residential/day program).

How Long: The time limit must be stipulated prior to the visit. The case manager may request an extension to the visit(s) by requesting an extension of the Approval Authority. The Approval Authority may terminate the pre-placement visit at any time.

Case Manager's Responsibilities

1. Provide necessary client information to providers before pre-placement visits.
2. Plan for emergency medical coverage for the duration of each visit.
3. Arrange date(s), time(s), length(s) and transportation with person to be involved in the pre-placement visit.
4. Providers shall report personal observation of visit(s) to case manager.
5. Make and report personal observation of visit(s).
6. Send summary reports of observations to team members and approval authority.

APPENDIX 3

(Date)

Notice of Placement

Dear _____:

This letter is your formal notification that the community services prescribed in the Transitional Individual Habilitation Plan for (Person) are in place. The plan has been reviewed and approved by the Special Management Unit. The Special Management Unit found that the community services prescribed in the Plan will be more beneficial for the habilitation of (Person) than Pennhurst.

The community residence established for (Person) is operated by (Agency) and is located at (Address). The day program, operated by (Agency), is at (Address). If you have not already visited these programs, your casemanager would be pleased to make arrangements for you to do so now.

In the event that you disagree with the provisions of the attached plan for community services, you have seven (7) days to demand a hearing (use attached form to approve the placement or demand a hearing) to determine whether the living arrangement and services being provided at Pennhurst are more beneficial to the person's habilitation than the living arrangements and services which have been made ready in the community in accordance with the TIHP. If a hearing is demanded, you and the other parties shall have an opportunity to present evidence and arguments, compel the attendance of witnesses (if necessary), cross examine the other parties' witnesses, receive a copy of the Hearing Master's report, and take exception to the report and seek review in the Federal Court. Detailed procedures for the hearings are attached.

If you do not request a hearing, the TIHP will be implemented and (Person) will be transferred to the designated community residence within thirty (30) days.

If you have any questions about anything in this letter, please call your casemanager, (Name of Casemanager), at (Phone), Special Management Unit - (215) 935-6222.

Sincerely,

County MH/MR Administrator (or Designee)

cc: Superintendent George Kopchick
Hearing Master
Special Management Unit

Attachments: Hearing Procedures
Transitional Individual Habilitation Plan

APPENDIX 4

APPENDIX 3

COVER SHEET

_____ COUNTY

TIHP/IHP
(circle one)

[redacted]

Response to Notice of Placement

Person's Name: _____

Date: _____

_____ I agree with the provisions of the Transitional Individual Habilitation Plan for community services (TIHP) and understand it will be implemente

* * * *

_____ I disagree with the provisions of the Transitional Individual Habilitat Plan (TIHP) and demand a hearing.

Written demand for a hearing must be sent to the Hearing Master within seven (7) da _____ (by date) _____. If you want a hearing, mail or deliver this form to:

Michael Lottman, Hearing Master
2100 Lewis Tower Building
225 S. 15th Street
Philadelphia, PA 19102

Please schedule the hearing:

_____ At the County Case Management Office.

_____ At Pennhurst Center

Interpreter needed:

_____ Yes

_____ No

_____ Specify Language

If Hearing is demanded, state objections to TIHP (optional):

_____

_____

_____
Signature

Resident ____(Check one)
Parent/Guardian ____
Advocate ____

(Form Letter II 5/80)

COUNTY LETTERHEAD

Date: _____

Re: _____

Dear M {Approval Authority} _____:

Please accept for review and approval the attached TIHP for _____. I agree with all the provisions of this plan and that the plan meets the needs of _____ and recommend its approval.

The aversive or restrictive procedures recommended by the team and listed below have been reviewed by myself or my designee. Based on this review, I concur that these procedures are necessary:

-
-
-

I assure that less restrictive procedures have been exhausted or determined to be inapplicable.

Sincerely,

Margaret Doe
County Administrator

COUNTY LETTERHEAD

Date: _____

Re: _____

Dear M (Approval Authority) _____:

Please accept for review and approval the attached IHP for _____. I agree with all the provisions of this plan and that the plan meets the needs of _____ and recommend its approval.

The aversive or restrictive procedures recommended by the team and listed below have been reviewed by myself or my designee. Based on this review, I concur that these procedures are necessary.

-
-
-

I assure that less restrictive procedures have been exhausted or determined to be inapplicable.

Sincerely,

Margaret Doe
County Administrator

☐ TRANSITIONAL INDIVIDUAL HABILITATION PLAN

☐ INDIVIDUAL HABILITATION PLAN

☐ MONITORING FORM ☐ CLINICAL FILE (check one)

NAME Mr. Ms. _____ DATE OF BIRTH _____ AGE ____ M__ F__

ALLERGIES/PRECAUTIONS _____

_____ IHP REVIEW DATE

Meeting Date(s) _____ BSU # _____

County: _____ Former Pennhurst ____ Waiting List _____

Current Address: _____

Current Phone Number: _____ Placement Date: _____

Family or Next Friend (Specify) _____

Address: _____ Phone: _____

Advocate: _____ Phone: _____

Advocate's Address: _____

Medical Coverage (Type & Number): _____

Social Security # _____ Income: _____ Type: _____

Other Insurance, trust or burial funds: _____

_____

Physical disabilities A. Vision ___ B. Hearing ___ C. Ambulation ___

D. Other ___ Define: _____

_____

A. SERVICES TO BE PROVIDED:

Case Management: Name, Address, Phone Number

_____

_____

_____

[redacted]

Residential Program: Name, Address of Home, Phone Number of Home, Contact Person - Type of residential setting (natural home, CLA, ICF/MR, etc.)

_____

_____

umber of people living in program: _____ Male _____ Female _____

taffing: # of full-time staff _____ # of part-time staff _____

taffing Pattern: _____

_____

vernight Awake Staff: Yes _____ No _____ Number _____

taff Training: _____

_____

_____

sidential Provider: Name, Address, Phone #, Project Director _____

_____

_____

ype of Supervision: _____

ay Program: Name, Address, Phone #, Contact Person, Staffing Ratio: ____

_____

_____

_____

_____

ealth Medical Services: Name, Address & Phone #

rimary Physician: _____

urologist: _____

ntist: _____

ynecologist: _____

thalmologist/Optometrist: _____

ther Specialists: (Specity) _____

[redacted]

Other Specialists cont'd

Therapy Services: (O.T., P.T., Speech, Counseling, Behavior, etc.) Name, Address & Phone Number.

Other Specialized Services: Name, Address & Phone Number

Adaptive Equipment:

Respite Care Services: Name, Address & Phone Number

Emergency Care Services: (Medical & Psychiatric): Name, Address & Phone Number

INSTRUCTIONS FOR TRANSITIONAL INDIVIDUAL HABILITATION PLAN

PRE-PLACEMENT ACTIVITIES

I. TRANSITIONAL NEEDS AND ISSUES

Describe those needs and issues which were identified by team and during pre-placement visits, as requiring special attention and specific programming during the transition period following the person's move to the community or during the four (4) months covered by this plan.

II. PROGRAMMING AREAS WHICH ADDRESS TRANSITION NEEDS AND ISSUES

Identify the programming areas which contain additional information and/or goals to deal with the needs and issues described above.

III. PROVIDERS' STAFF VISITS TO PERSON (DATES)

List the dates of visits made by providers' staff (residential and day program) including program consultants to the individual at Pennhurst/present residential facility. (list dates of visits made by residential and day program providers if person is already in community and change in program is planned).

IV. VISITS TO COMMUNITY (ACTUAL: DATES, DURATION)

(Projected: Dates, Duration)

Describe the person's adjustment and reaction to visits. Include on which dates case manager was present.

[redacted]

RE: TIHP/IHP FOR No. _____

TIHP/IHP AGREEMENT/DISAGREEMENT FORM

IGNING AGREE ON THIS FORM INDICATES PARTICIPATION IN THE TIHP/IHP PLANNING ETING and/or AGREEMENT WITH THE CONTENT OF THE PLAN AND SERVICES TO BE OVIDED AND IN NO WAY ELIMINATES THE PERSON, PARENT/GUARDIAN/RELATIVE, RTIFIED ADVOCATE'S RIGHT TO REQUEST INDIVIDUAL DETERMINATION OR CHANGE EIR MIND AT A LATER DATE. THE AGREE/DISAGREE FORM MUST BE RECEIVED BY E APPROVAL AUTHORITY IN ORDER FOR THE PLAN TO BE REVIEWED.

IGNING DISAGREE OR NOT SIGNING THIS FORM INDICATES A REQUEST FOR MEDIATION.

__ I AGREE
SIGNATURE, PERSON PLANNED FOR _____ DATE _____

__ I DISAGREE
ADDRESS _____

CASE MANAGER HAS EXPLAINED THIS PLAN

COMMENTS: _____

_____

SIGNATURE, CASE MANAGER _____ DATE _____

__ I/WE AGREE
SIGNATURE, PARENT/GUARDIAN/RELATIVE _____ DATE _____

__ I/WE DISAGREE
ADDRESS _____

__ I AGREE
SIGNATURE, CERTIFIED ADVOCATE _____ DATE _____

__ I DISAGREE
ADDRESS _____

__ I AGREE
SIGNATURE, CLA/RESIDENTIAL PROVIDER _____ DATE _____

__ I DISAGREE
ADDRESS _____

__ I AGREE
SIGNATURE, DAY PROGRAM PROVIDER _____ DATE _____

__ I DISAGREE
ADDRESS _____

[redacted]

IHP/IHP ATTENDANCE SHE

MEETING DATE_____

NAME, ADDRESS, PHONE NUMBER	ROLE AND RELATIONSHIP TO PERSON

General Health
Medical/Sensory Concerns

SUMMARY

1. Date last physical exam: _____ Physician: _____

   Weight: _____ Height: _____ B/P _____

   Other findings: _____

   _____

   Recommendations/Treatment: _____

   _____

   Return visit due: _____

2. Dental - last exam: _____ Dentist: _____

   Findings/Recommendations/Treatment: _____

   _____

   _____

   Return visit due: _____ Frequency: _____

3. Speciality Examinations:

   a. Gynecological - last exam: _____ Physician _____

      Procedures: _____

      Results: _____

      Recommendations/Treatment: _____

      _____

      Return visit due: _____ Frequency: _____

   b. Neurological - last visit: _____ Physician _____

      Procedures: _____

      Results: _____

      Recommendations/Treatment: _____

      _____

      Return visit due: _____ Frequency: _____

I. General Health continued

c. Podiatry - last visit: _____ Physician _____

Procedures: _____

Results: _____

Recommendations/treatment: _____

_____

Return visit due: _____ Frequency: _____

d. Opthalmological - last visit: _____ Physician _____

Procedures: _____

Results: _____

Recommendations/treatment: _____

_____

Did examination include: vision screening _____;
screening for pathologies of the eye _____

Return visit due: _____ Frequency: _____

e. Audiological - last visit: _____ Physician _____

Procedures: _____

Results: _____

Recommendations/treatment: _____

_____

Return visit due: _____

f. Other: (Psychiatric, Cardiological, Dermatological, Orthopedic, ENT, Urology, etc.)

[redacted]

4. Describe procedure for sharing medical reports within the team.

5. Summary Comments: Describe medical background, history, problems, if any, such as chronic illnesses or conditions, injuries, acute episodes, diet and nutritional concerns, treatment regimens, etc. How medical care will be coordinated. How Pennhurst or previous residence's records will be shared. (TIHP only)

6. Medications:

Type & Dosage	Reason	Reviewing Physician	Last Review	Frequency of Review & Blood Levels

I. General Health (continued)

7. Allergies/precautions (Include known or suspected allergies, medications precautions, contagion precautions, activity limitations & history of choking).

8. Hepatitis B. screening? Yes_____ No_____

Results?

B. Goals:

Long Term Goal #1

Objective(s):

Method:

Evaluation:

Person(s) responsible:

Additional Long-Term Goals & Objectives designed to provide the class member with minimally adequate habilitation in the least restrictive environment in accordance with this Court's Orders: (Continue on another sheet).

II. Motor/Communication: (P.T., O.T., Motor Skills, Speech, Other Support Services)

A. Summary: (Describe current motor and communication skills, dates and recommendations of evaluations in the past year, specialized services, adaptive equipment plan.

II. Motor/Communication (continued)

B. Long Term Goal #1: (If goals are not to be included in this plan, summary should be explicit as to the reason(s) why this is inapplicable or not a priority at this time.)

Method:

Evaluaton:

Person Responsible:

Additional Long Term Goals and Objectives Designed to Provide the Pennhurst Class Member with Minimally Adequate Habilitation in the Least Restrictive Environment in Accordance with this Court's Orders: (continue on another sheet).

I. Residential Living: (ADL, Community Awareness, Educational Skills).

A. Summary

1. Personal Care Skills: (Indicate current capabilities in following areas:)

a. Toileting -

b. Eating -

c. Bathing -

d. Dressing -

e. Teeth Care -

f. Hair Care -

g. Personal Hygiene -

h. Other -

2. Housekeeping Skills:

a. Meal Preparation/Menu Planning -

b. Cooking -

c. Vacuuming -

d. Dusting -

e. Bedmaking -

[redacted]

f. Residential Living Continued

f. Laundry -

g. Dishwashing -

h. Table Setting -

i. Other

3. Community Awareness:

a. Awareness of Danger (circle one)

			Comments
(1) Fire	Yes	No	
(2) Traffic	Yes	No	
(3) Hot Stove	Yes	No	
(4) Hot Water	Yes	No	

b. Knows name Yes No

Knows address Yes No

Knows phone number Yes No

c. Use of personal identification (describe).

d. Use of telephone (describe).

e. Use of public transportation Yes ___ No ___

Availability of transportation? Public___ Private ___ Other ___. If not, why not?

[redacted]

I. Residential Living continued (Indicate current capabilities in the following areas).

f. Ordering in Restaurants -

g. Shopping, purchasing -

h. Traveling about neighborhood -

i. Other

4. Educational Skills: (Recognizing sight words, counting, reading, writing, coin recognition, understanding value of money, budgeting money, banking skills, telling time, etc.

Describe academic skills of person

5. Summarize progress on goals from last plan

[redacted]

III. Residential Living continued

B. Long Term Goal #1:

Objective:

Method:

Evaluation:

Person Responsible:

Additional Long Term Goals Designed to Provide the Pennhurst Class Member with Minimally Adequate Habilitation in the Least Restrictive Environment in Accordance with this Court's Orders: (continue on another sheet).

IV. Vocational/Educational Skills

A. **Summary**: (Include date(s) of evaluation(s). Describe the person's current job, school or day program, current skill levels, progress or goals since last plan. \Include other relevant information. Include date of IWPP/IPP/IEP meeting. Attach IWPP/IPP/IEP.

B. **Long Term Goal #1:**

Objective:

Methods:

Evaluation:

Person Responsible:

Additional Long Term Goals Designed to Provide the Pennhurst Class Member with Minimally Adequate Habilitation in the Least Restrictive Environment in Accordance with this Court's Orders: (continue on another sheet).

7. Personal Adjustment

A. Summary:

1. Describe the person's current adjustment to everyday life experiences, routines, etc. Include strengths, positive changes, any inappropriate or maladaptive behaviors.

2. Describe the person's abilities in making and understanding appropriate emotional responses (e.g., happiness, anger, frustration, fear, sadness, joy, etc.)

3. If mental health concerns exist, please describe.

4. Summarize the progress made on goals from the previous plan.

[redacted]

V. Personal Adjustment (continued)

5. If a behavioral program is in effect, please describe or attach.

6. Are restrictive or aversive procedures used? (Either in day or residential program). If yes, please attach complete program. Have less restrictive alternatives been attempted? What are they? Why are more restrictive procedures necessary? How often is this program reviewed? By whom?

7. Are any special services, counseling, etc., provided?

B. Long Term Goal #1: (If goals are not to be included in this plan, the summary should be explicit as to the reason(s) why this is inapplicable or not a priority at this time.)

Objective:

Methods:

Evaluation:

Person Responsible:

V. Personal Adjustment (continued)

Additional Long Term Goals and Ojbectives Designed to Provide the Pennhurst Class Member with Minimally Adequate Habilitation in the Least Restrictive Environment in Accordance with this Court's Orders:

VI. Socialization/Recreation:

A. Summary

1. Describe person's level of interactions with others (peers, staff, family, strangers). Include present relationships.

2. Describe leisure and recreational activities of person. Specify in-house or community activities. Include whether or not self-initiated. How often do activities occur? Preferences?

3. Describe persons stated or apparent preferences and participation in religious activities. Include frequency and supports provided.

4. Summarize the progress made on goals from the previous plan.

[redacted]

VI. Socialization/Recreation continued

B. Long Term Goal #1:

Objective:

Method:

Evaluation:

Person Responsible:

Additional Long Term Goals and Objectives Designed to Provide the Pennhurst Class Member with Minimally Adequate Habilitation in the Least Restrictive Environment in Accordance with this Court's Orders: (continue on another sheet).

Financial and Other Concerns

A. Summary:

1. (TIHP only) Document that SSI and MA have been applied for. (Plan will not be reviewed unless SSI and MA application has been made or ineligibility determined.)

2. Describe income, payeeship, banking arrangements and provisions for personal funds.

3. Describe health insurance.

4. Describe other insurance.

5. Describe estate planning (trusts, burial funds, etc.)

6. Describe any other issues not already covered in this plan.

[redacted]

VII. Financial and Other Concerns (continued)

B. Long Term Goal #1: (If goals are not to be included, summary should be explicit as to the reason(s) why this is not a priority at this time.)

Objectives:

Methods:

Evaluation:

Person Responsible:

Additional Long Term Goals and Objectives Designed to Provide the Pennhurst Class Member with Minimally Adequate Habilitation in the Least Restrictive Environment in Accordance with this Court's Orders:

Responsibilities of County Administrator for Program Relocation

Definitions

Planned Relocation: A planned relocation is any change in the location of an individual's residence and/or day program based on supportive data which indicates that such a change is in the best interest of the individual and is known as probable more than ten calendar days prior to the relocation.

Emergency Relocation: Emergency relocation is any change in the location in an individual's residential/day program necessitated by a situation which would place the individual or others in danger or serious physical or psychological harm and is known as probable less than ten calendar days prior to the relocation.

KEY: x = Must occur • = Determination at time of relocation by SMU	ACTION REQUIRED		COUNTY ACTION		
	Immediate notification of proposed relocation to SMU & Regional Commissioner.	TIHP Submitted to SMU for Approval in accordance with steps 7-16 of the procedures.	Move Approved by SMU.	TIHP submitted to SMU for Approval within 15 calendar days of emergency relocation.	Addendum submitted to SMU for approval.
Independent living	x	•		•	
Natural Family	x	•		•	
Foster Care	x	x	x	x	
Group home (8 beds or less)	x	x	x	x	
Respite Care	x		•	•	•
Private licensed Facility ICF/MR or Group home of more than 8 beds	x	x	x	x	
State Center or Woodhaven	x	x			
Emergency Inpatient Mental Health Facility	x				x
Nursing Home	x	x	x		
Acute Care Medical Facility	x				•
Other relocations (including change in Day program)	x	•	•	•	•

[redacted]PPENDIX 7

DISTRIBUTED
SEP 12 83

ORIGINAL

FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
Petitioners,

v.

TERRI LEE HALDERMAN, et al.,
Respondents.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' OPPOSITION TO HALDERMAN RESPONDENTS' PETITION TO DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

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No. 81-2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
Petitioners,

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ON CERTIORARI TO THE UNITED STATES
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PETITIONERS' OPPOSITION TO HALDERMAN RESPONDENTS' PETITION TO DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

Relying on an Order of the district court dated August 26, 1983, the Halderman respondents have filed their second Motion to Dismiss Certiorari as improvidently granted. (The first motion was denied on October 12, 1982.) This new motion has no more merit than the first one.[1/]

We take this view for several reasons. First, the August 26 Order has no bearing whatsoever on the primary issues regarding the Eleventh Amendment and comity, the very issues on which the

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1/ To put this Motion in historical perspective, we note that it is but one in a series of efforts by Halderman respondents to evade review on the merits. As we point out in the text, they have now filed two motions to dismiss since certiorari was granted for the second time in June, 1982. Previously, they sought to dismiss certiorari as improvidently granted at the time of the initial review by this Court. Brief for Halderman Respondents, No. 79-1404. In the related contempt case, now pending before the Court, they have opposed certiorari on the ground that a subsequent order makes the case moot. Halderman Brief in Opposition No. 81-2363. The Halderman respondents have also filed numerous motions to dismiss appeals in the Third Circuit. See C.A.3, Nos. 81-2381, 82-1147, 82-1280.

Court has asked for reargument. As its own terms make clear, the Order fully reflects the mandate from the Third Circuit to create and favor community facilities over larger-scale institutions, regardless of the preferences of state officials or the extent and type of funding provided by the state legislature. Our principal argument, of course, is that the Eleventh Amendment and principles of comity prevent a federal court from imposing such a mandate in the first place, when its basis is simply the opinion of the federal court about state law. Second, even with regard to the issue of implementing this improper mandate, the Order scarcely demonstrates an appropriate deference to state efforts. Rather, the Order continues to exalt the role of the federal court at the expense of state officials.

1. The Order Has No Affect On the Core Issues Regarding the Eleventh Amendment and Principles of Comity

The primary issues raised by the petition and the briefs for petitioners, and the issues to be addressed on reargument, are whether a federal court, consistently with the Eleventh Amendment and principles of comity, may order state officials to revamp state programs with state funds solely on the basis of its reading of state law. These issues arise in this case from a judgment of the Third Circuit requiring state officials to move all class members from state institutions into community facilities that must be created by the state unless the class members can overcome a court-fashioned presumption in favor of community care. Because this relief necessarily operates against the state itself (and not its officials personally), and because the principles of federal supremacy set forth in Ex Parte Young, 209 U.S. 123 (1908), are not applicable here, we believe that the Eleventh Amendment bars such an order or, at the least, that principles of comity should be held to do so.

The August 26 Order has no effect at all on these issues. Indeed, the entire thrust of the Order is to make clear that placement of retarded persons must be undertaken in accordance with the wishes of the federal court. Thus, the very first

paragraph embodies an injunction "to provide suitable community living facilities" and related community services for every class member. August 26 Order, ¶1, at 1-2. A later paragraph orders the state and county petitioners "to assure that community living facilities and other community services of the necessary quantity and quality are provided and maintained." August 26 Order, ¶3, at 2a. Still another paragraph requires a plan showing the quantity and type of community living facilities "necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting," as well as "[s]ources and anticipated or available amounts of funding ***." August 26 Order, ¶5, at 3. The State is given little or no discretion with regard to these matters.

Turning to the other side of the coin, the district court with certain exceptions further prohibits the defendants from, among other things, "recommending or in any way counseling that any individual be committed or admitted to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst***." August 26 Order, ¶39, at 33. In the following paragraph, the Order extends the same prohibition to cover admission to "any institution operated by the Commonwealth defendants." August 26 Order, ¶40, at 37. These directives, which again embody the judgment of the Third Circuit now before this Court, are unmistakeably intended to control the discretion of Pennsylvania officials upon pain of contempt.

This degree of control is, in fact, driven home again and again in the Order. Whatever the state officials might otherwise prefer, the Order requires that every Individual Habilitation Plan provide for habilitation "in an appropriate community living facility." August 26 Order, ¶35 at 27-28. Although a class member (or a parent, guardian, or advocate) may object, a Hearing Master or the Court (not state officials) makes the final decision, "guided by the presumption in favor of placing individuals in community living facilities, as set forth by the Court of Appeals for the Third Circuit." August 26 Order, ¶38,

at 31 (emphasis added). Should anyone object to the Court-ordered denial of admission to Pennhurst, the Hearing Master or Court again makes the final decision "guided by the presumption" mandated by the Third Circuit. August 26 Order, ¶39, at 36. The Order further makes plain that, while the state must pay for the Master, his staff, his office, and his expenses, the Master Order, ¶36, at 28.

It is, in short, fatuous for respondent Halderman to say that the essence of our petition " - that a federal court is intruding on state processes - is reduced to the point of extreme tenuousness." Petition to Dismiss at 3. To the contrary, as even a cursory reading of the Order shows, the federal courts have deprived the state of control over the most basic of choices regarding care and treatment: that is, where the care and treatment shall be provided.2/ In establishing and implementing the state programs, neither the legislature nor the state officials in charge of their operation have ever barred retarded persons from state institutions or insisted upon wholesale transfer of residents to community facilties. The enforcement of that judicial requirement thus will literally restructure the entire system of state care and treatment for the mentally retarded. If the system preferred by the Court turns out to be unwise, or unworkable, or prohibitively expensive, it is the State and its retarded citizens that must bear the consequences.

Our position thus remains absolutely unchanged by the August 26 Order. This state-law claim, ordering state officials to create new facilities and relocate retarded persons according to judicial direction, is in fact a claim against the state. While state officials are nominal defendants, the claim is directed against conduct within the ambit of their official duties and requires affirmative relief from the state itself. Whereas some similar claims are permitted against state officials under

---

2/ The choice of facilities, in turn, has obvious effects on staffing, programming, security, interraction with others - indeed the full range of choices regarding care and treatment of the mentally retarded.

federal law, because "[t]he State has no power to impart to [a state official] any immunity from responsibility to the supreme authority of the United States" (Ex Parte Young, supra, 209 U.S. at 160), no such "supreme authority" strips the state and its officials of immunity from state-law claims.3/ In seeking and obtaining passage of the Eleventh Amendment, which after all contains a flat bar against all suits in law or equity, the states can hardly have planned to make themselves subservient to federal courts in the implementation of their own laws.

2. The Order Is Overbearing and Intrusive

Although the August 26 Order does have some bearing on the issue of the Master (the third issue raised in the petition and briefs), it does not have the effect that the Halderman respondents suggest.4/ Far from "granting new and extraordinary deference to State and County defendants' discretion" (Petition to Dismiss at 1), the Order embodies an infrastructure that gives the Hearing Master exceptional powers and makes a voluntary state group (the Special Management Unit) into a virtual agent of the Court.

Because the August 26 Order demonstrates on its face the degree of judicial control, we will not review its provisions in detail. For present purposes, it is enough to note that the Hearing Master and then the Court have final authority to decide (following the presumption set forth by the Third Circuit) whether a class member must move to a community facility or may remain or be admitted to an institution. August 26 Order, ¶¶38-

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3/ Immunity under the Eleventh Amendment is not forfeited simply because plaintiffs make the barred claim a pendent claim. See Edelman v. Jordan, 415 U.S. 651 (1974). If the claim is in fact an impermissible one against the state, the basis of jurisdiction makes no difference.

4/ The changes occasioned by the August 26 Order are largely, if not exclusively, intended to reflect the Order of August 12, 1982 (regarding termination of the Special Master), on which respondent Halderman's next most recent motion to dismiss was based. The earlier Order did not afford a sufficient basis for discussing certiorari, and this derivative Order affords no more.

40, at 30-40. Indeed, the Hearing Master may even order petitioners to place residents in a different community facility from the one proposed. August 26 Order, ¶38, at 32-33. Thus, petitioners not only must work under the weight of a judicially-imposed presumption but must have their application of that presumption controlled by a Master and, ultimately, the Court itself.

We also note that, while certain duties of the Special Master have been transferred to the state Special Management Unit, that transfer is a mixed blessing. As the price for allowing the Unit to assume certain responsibilities, the Court has imposed on that Unit other responsibilities of its own choosing and has limited the State to assigning it "non-conflicting duties and responsibilities." August 26 Order, ¶18, at 19-20. The result is that a group set up by the State for its own purposes is now an entrenched part of the Court plan for implementing Court orders, with state authority over that group reduced to a secondary role. Once again, the judicial intrusion into state affairs is significant.

Finally, we think it relevant that, in an Order issued three days after the Order emphasized by respondents, the district court directed petitioners to submit "plans to provide community living facilities *** for retarded persons in the Southeast Region of Pennsylvania who are not members of the Pennhurst plaintiff class ***." August 29 Order (attached hereto as Appendix A), at 1 (emphasis added). In overseeing state programs, therefore, the Court has taken upon itself to review plans of persons not even under the jurisdiction of the court "to determine whether these plans are appropriate and consistent with the injunctive relief previously ordered by this Court." August 29 Order, at 2. This broad exercise of power would seem more appropriate to an executive position than to a judicial one.

Petitioners have already been subject to one judgment,

based on the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000 et seq. (see 451 U.S. 1 (1981)), that was reversed by this Court. If the present judgment is likewise invalid, as we believe to be, this Court should reverse it as well, so that the State can operate its mental retardation program without improper interference from a federal court. The motion to dismiss certiorari should be denied.

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The undersigned hereby certifies that copies of the foregoing Petitioners' Opposition to Halderman Respondents' Petition To Dismiss Certiorari As Improvidently Granted were this day served by first class mail, postage prepaid, on all counsel at the following addresses:

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Dated: September 12, 1983

H. Barton Farr III

H. BARTON FARR III

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SUPREME COURT, U.S.

NO. 81-2101
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

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COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF HALDERMAN AND PARC RESPONDENTS TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS CERTIORARI

Now that the intrusion they've complained of heretofore has been eliminated, Petitioners shift to new ground to support certiorari, that the district court entered "a mandate to create and favor community facilities over large-scale institutions." Opposition, p.2. Respondents submit that the Eleventh Amendment and comity questions raised to the mandate itself, as opposed to the originally alleged intrusions, are not worthy of certiorari.*

*The provisions of the August 28, 1983 Amendment of which petitioners complain across pages 3-6 of their Opposition are no part of the March 17, 1978 Order under review here, but originate in subsequent orders not here, some of which were never appealled by any Petitioner (like the hearing master order) and others of which were and have been decided by the Court of Appeals with no application for certiorari.

The mandate itself adopted the state's own position taken consistently by the state before, during and after trial: that Pennhurst had to be closed and the only practicable solution for its wrongs was to get its retarded residents into community living arrangements. The district court in 1978 felt it necessary to impose a detailed order specifying how, when and in what manner this remedy was to proceed, so detailed in the state's view as to improperly take away the state's discretion under the Eleventh Amendment and comity.* Now in its current order, the state having successfully transferred half of Pennhurst's residents, the district court has done exactly what the state has asked that it do: accord design, pace and timing to the control of the state.

There is no question here but that the abominable conditions of Pennhurst and the injuries they impose upon Pennhurst residents violate state law. Petitioners sought no certiorari on this question, none was granted, and the correctness of the unanimous holding below is thus conceded here. Similarly, this Court unanimously found that the injuries imposed upon one member of the class by the conditions at Pennhurst, Nicholas Romeo, violate the Fourteenth Amendment, Youngberg v. Romeo, 102 S. Ct. 2452 (1982),** and in this case no certiorari was sought on the substantiality of the underlying Fourteenth Amendment claim.

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*Improperly in the state's view at least since 1982, for the Eleventh Amendment and comity issues were not raised by Petitioners in the district court, nor in the initial hearings in the Court of Appeals, nor when the case was first here, but were raised for the first time in 1982 when the case was again before the Circuit on remand by this Court with directions to the Court of Appeals to decide the state law ground, a new argument which would have required that Court to ignore the mandate of this court.

**Nicholas Romeo, whose placement in a family scale community facility pursuant to the injunction in this case, had been scheduled by state and county officials for late summer 1982, was in fact placed on April 4, 1983, four days after he was found at Pennhurst with his back and buttocks covered with abrasions in the shape of a toilet brush.

Eleventh Amendment and comity arguments against overriding a state's will are peculiarly ill-suited for decision in a case where the mandate follows the will of the state. The mandate hwere, embodied in the March 17, 1978 and the current injunction, to remedy those conditions, was not "simply the opinion of the federal court about state law" nor was it formulated "regardless of the preferences of state officials or the extent or type of funding provided by the state legislature." Petitioners Opposition, p. 2. To the contrary, the mandate enjoined the remedy which the state itself recommended to the Court, Milliken v. Bradley 433 U.S. 267, . (1977), the remedy which state officials throughout the decade before had identified as necessary to correct the wrongs at Pennhurst and repeatedly promised to perform.*

The district court, in a finding never contested, in any phase of the appeals of this case, found:

> "all parties [including defendants] believe that Pennhurst should be closed and the residents should be educated, trained and cared for in the community."
>
> "[T]he Pennsylvania Department of Public Welfare's curent plans call for the transfer of all Pennhurst residents from the institution into the community (though perhaps temporarily into other institutions) by the early 1980s." 448 F.Supp. at 1313.

That was the state executive's submission to the court after judgment, Doc. Item No. 455, January 27, 1978; 448 F.Supp. at 1325, at trial, e.g. Testimony of Rice, the ranking state officer to testify, A862-A," Com. Def. Ex. 727; and it was the state executive's constant position for the decade before. See e.g.

---

*That the state had not done so, whether because of inertia or because it judged retarded people or the injuries to them of insufficient importance to command state redress, was the reason for this litigation, not any difference between plaintiffs and the state as to what would be the remedy. Romeo has settled that these injuries are of constitutional importance.

April 12, 1973 Memorandum of Edward R. Goldman, Commissioner of Mental Retardation, Re: Proposed Expenditure of all Capital Funds for Pennhurst (Questons raised regarding the proposed total dispersal of that institution by the end of fiscal year 1974-1975." PARC Ex. 25 (A948); Statement of Secretary of Public Welfare, 12/14/72. PARC Ex. 26 (A971); The Governor's Review -- 1975, Sec. II, 'Welfare and Mental Health'. PARC Ex. 28 (A974)

Thus the state executive chose the solution adopted by the court and the state legislature had itself directed the same solution for Pennhurst -- a far cry from Petitioner's cry that this court mandate transgressed "the extent and type of funding provided by the state legislature." In 1970 by Act 256, the state legislature had appropriated $21 million for:

> "normalizing accommodations ... for approximately 900 Pennhurst patients ... to provide logical dispersal and orientation into the community for Pennhurst residents and alternatives to institutionalization for the Pennhurst waiting list population and other mentally retarded citizens of the area ... to be completed as expeditiously as possible so that the first units may be occupied not later than two years from the effective date of the Act. (235a-236a)*

(This 1970 Appropriations Act is, of course, apart from the generally applicable instructions of the legislature in the underlying 1966 state statute on retardation).

By their shift of ground Petitioners all but concede that the current injunction has eliminated the intrusions which were lately the burden of their plea here. Eleventh Amendment and

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*"As of April 25, 1977", the district court found, "only 37 Pennhurst residents had directly benefitted from this [the 1970] Act." 448 F. Supp. at 1312. As of 1977, 1230 people remained at Pennhurst.

comity arguments against overriding a state's will are peculiarly ill-suited for decision in a case where the mandate of the March 17, 1978 and the current injunction follows the will of the state. If long-established doctrines of the exercise of pendent jurisdiction pursuant to Fourteenth Amendment rights were to be altered, it would be more appropriate to address any change in a case where the issue had been litigated from the beginning in the district court rather than in a case where the issue was first raised in the 8th year to evade the mandate of this court.

For the foregoing reasons, certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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v.

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Respondents.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

CERTIFICATE OF SERVICE

I, THOMAS K. GILHOOL, a member of the bar of the Supreme Court of the United States, hereby certifies that I served true and correct copies of the foregoing Reply of Halderman and PARC Respondents to Petitioners' Opposition to Motion to Dismiss Certiorari upon all counsel for all parties, by United States Mail, first-class, prepaid postage by mailing same to the addresses below. I further certify that all parties required to be served have been served.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.	:	CIVIL ACTION
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.	:	NO. 74-1345

ORDER

FILED AUG 29 1983

AND NOW, this 29th day of August, 1983,

IT IS HEREBY ORDERED: The defendants shall submit to this Court, on or before October 1, 1983, their: (1) plans to provide community living facilities together with all services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class members in the Southeast Region of Pennsylania (Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties) during the period commencing July 1, 1984 and closing June 30, 1985; (2) plans to provide community living facilities together with all the services required by the retarded person's individual habilitation plan for retarded persons in the Southeast Region of Pennsylvania who are not members of the Pennhurst plaintiff class for the period commencing July 1, 1984 and closing June 30, 1985; and (3) plans to provide community living facilities together with all the services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class

TERED: 8-30-83

CLERK OF COURT

members from counties outside the Southeast Region of Pennsylvania during the period commencing July 1, 1984 and closing June 30, 1985.

IT IS FURTHER ORDERED: A hearing shall be held on Monday, October 17, 1983 at 10:00 a.m. in Courtroom 10-B of this United States Courthouse, 601 Market Street, Philadelphia, concerning the aforesaid proposals, to determine whether these plans are appropriate and consistent with the injunctive relief previously ordered by this Court.

RAYMOND J. BRODERICK, J.

NO. 81-2101-CFX See: 81-2363	TITLE	Pennhurst State School and Hospital, et al., Petitioners v. Terri Lee Halderman, et al.

DOCKETED	COURT
May 13, 1982	United States Court of Appeals for the Third Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: H. Bartow Farr, III
	Counsel for Respondents: Solicitor General, Thomas K. Gilhool
Sept. 15, 1981	Application for stay filed, and order denying same by Brennan, J., Sept. 17, 1981.
Sept. 17, 1981	Application for stay refiled with Rehnquist, J.
Sept. 22, 1981	Response by U.S. filed.
Sept. 25, 1981	Response by Halderman filed.
Sept. 25, 1981	Response by PARC filed in opposition.
Sept. 28, 1981	Reply by State of Pennsylvania filed.
Sept. 28, 1981	Response by Suburban Counties (Joinder of Sub. Counties)
Oct. 5, 1982	The application for stay of the orders of the United States District Court for the Eastern District of Pennsylvania, entered Apr. 24, 1980, May 28, 1980, July 14, 1980 and March 2, 1981, addressed to Rehnquist, j., and referred to the Court is DENIED.
May 13, 1982	Petition for writ of certiorari filed. (Record filed).
May 28, 1982	Brief of respondent PARC et al. in opposition filed.
May 27, 1982	Motion of respondents Halderman, et al. for leave to proceed in forma pauperis, and brief in opposition filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 1, 1982	Brief for the U. S. in opposition field. (D).
June 4, 1982	Brief, amici curiae on behalf of Alabama, American Samoa, et al. in support of petition filed.
June 4, 1982	Reply brief for the petitioners filed. (D).
June 7, 1982	Brief, amicus curiae, of the State of New York in support of petition filed. (D).
June 21, 1982	The motion of respondents Terri Lee Halderman, et al. for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

July 19, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Sept. 4, 1982.
Sept. 3, 1982	Brief for the petitioners filed.
Sept. 4, 1982	Brief, amici curiae, for Alabama, et al. filed.
Sept. 7, 1982	Joint appendix filed.
Sept. 20, 1982	Motion of respondents Terri Lee Halderman, et al. to dismiss writ of certiorari as improvidently granted.
Sept. 22, 1982	DISTRIBUTED. 10-8. (Above motion)

(OVER)

81-2101

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 1, 1982	Order extending time to file the respondents' brief on the merits until Nov. 15, 1982.
Oct. 4, 1982	Opposition by petitioners to motion of respondents to dismiss writ of certiorari as improvidently granted filed.
Oct. 6, 1982	Reply of respondents' to petitioners' opposition to motion filed.
Oct. 6, 1982	Supplemental memorandum for Halderman respondents filed.
Oct. 12, 1982	The motion of respondents Halderman, et al. to dismiss the writ of certiorari as improvidently granted is DENIED.
Nov. 16, 1982	Brief of respondens Terri Lee Halderman, et al. filed.
Nov. 17, 1982	Brief of respondents PARC, et al. filed.
Nov. 16, 1982	Application for leave to file respondents' brief on the merits in excess of page limitations, and order granting same by Brennan, J., 11/17/82, not to exceed 93 pages.
Nov. 24, 1982	Brief for the United States filed.
Dec. 14, 1982	CIRCULATED.
Jan. 5, 1983	Motion of the parties for divided argument filed.
Jan. 17, 1983	The motion of the parties for divided argument is GRANTED.
Feb. 15, 1983	Reply brief for petitioners filed. (D).
Feb. 22, 1983	ARGUED.
July 6, 1983	The case is restored to the calendar for reargument.
Aug. 15, 1983	SET FOR REARGUMENT. Monday, October 3, 1983. (3rd case)
Sept. 1, 1983	Motion of respondents to dismiss writ of certiorari as improvidently granted filed. (NP).
Sept. 7, 1983	DISTRIBUTED. SL25P5. (Above motion).
Sept. 12, 1983	Opposition of petitioners to motion of respondents to dismiss writ of certiorari as improvidently granted.
Sept. 27, 1983	The motion of respondents to dismiss the writ of certiorari as improvidently granted is DENIED.
Oct. 3, 1983	REARGUED.